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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 28, 1998

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Questions Presented

The questions presented for review are:

1. Whether an Establishment Clause claim of religious purpose must allege an express and contemporaneous admission by a state actor that the challenged conduct was intended as an endorsement of religion, or may such a claim be based on circumstantial and historical evidence that the conduct was intended to promote religion.

2. Whether Establishment Clause cases are exempt from the ordinary rule at the pleading stage that a plaintiff's allegations are to be read in the light most favorable to the plaintiff.

List of Parties

The parties to the proceedings before the United States Court of Appeals for the Tenth Circuit were petitioner Rachel Bauchman, by and through her parent and guardian Cheryl Bauchman; respondents West High School, Salt Lake City School District, Richard Torgerson, William Boston, Gene Bonella, Teresa Piele, Dolores Riley, Darline Robles, Dale Manning and Mary Jo Rasmussen; and respondent-intervenors Leila Quinones Barela, by and through her father, Luke J. Barela; Luke J. Barela, in his own capacity, Tamra M. Badger, by and through her parent and guardian, William A. Badger, William A. Badger, in his own capacity, Cindy R. Badger, Eric Michael Nielsen, by and through his parent and guardian Greg Nielsen; Greg Nielsen, in his own capacity, Jo Rita Nielsen, Heather Pettit, by and through her parent and guardian, Ralph Pettit; Ralph Pettit, in his own capacity, Elaine Pettit, Joy M. Warthen, by and through her parent and guardian, Lee Warthen, Alexander B. Warthen, by and through his parent and guardian, Lee Warthen, Lee Warthen, in his own capacity, Barbara Warthen, Steven C. Eror, Jr., by and through his parent and guardian, Steven C. Eror, Steven C. Eror, in his own capacity, Judy H. Error, Jane Curtis, by and through her parent and guardian, Marvin R. Curtis, Jr., Marvin R. Curtis, Jr., in his own capacity, and Joan C. Curtis.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Rachel Bauchman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case.

Opinions and Order Below

The order of an equally divided court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* is reprinted in the appendix hereto at page A1. The panel opinions are reported at 132 F.3d 542 and are reprinted in the appendix hereto at pages A2 through A77. The district court opinion is reported at No. 95-C-506G, 1996 WL 407856 (D. Utah May 30, 1996) and reprinted at pages A78 through A109.

Jurisdiction

The judgment of the court of appeals was entered on December 18, 1997, and petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Section 1983 of U.S. Code Title 42 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Statement of the Case

A. The Amended Complaint

Petitioner Rachel Bauchman ("Rachel") was, at the time this action began, a sophomore at West High School, a public school in Salt Lake City, Utah. Rachel is Jewish. She brought this action against the school district and school officials alleging that the high school choir class teacher was using the class as a vehicle to promote the Mormon religion. After the district court dismissed her original complaint, Rachel sought to file an amended complaint that advanced extensive and detailed allegations that the teacher, over a period of years, said prayers in leading class activities and introducing performances, held concerts at religious ceremonies, included an overwhelming preponderance of religious songs in the class's repertoire,

sought to exclude Rachel and other non-Mormon students from class activities, repeatedly admitted that the class had a religious purpose and criticized Rachel, identifying her by her religion, for objecting to the class's religious content.

The allegations were, in summary form, as follows:[1]

Respondent Richard Torgerson ("Torgerson") has promoted religion in his public school singing classes for twenty years. Under Torgerson's direction, his class for many years regularly participated in Mormon Church worship services, singing a disproportionately large number of Christian devotional songs and Mormon hymns and taking part in Mormon prayers and sacrament meetings. Amended Complaint ("A.C.") ¶ 16(b), (d)-(g), (j)-(m); TCA 158-59, 160-62, 250, 337, 346-47.[2] Several years prior to Rachel's school year, Torgerson admitted his preference for Mormon students, explaining that things were much easier if the students in the choir class were members of the Mormon Church because the choir class participated in Mormon sacrament meetings. A.C. ¶ 16(d); TCA 158-59, 222. Indeed, he even required prospective students to identify their religion on class application forms. A.C. ¶ 16(d); TCA 158-59.

There were also instances prior to Rachel's class year in which Torgerson commemorated class events with traditional Mormon prayers, invoking "our heavenly father" and closing with, "in the name of Jesus Christ, amen." A.C. ¶ 16(k); TCA 160-61, 250, 329, 346, 352. Torgerson also emphasized

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[1] The allegations of the proposed Amended Complaint are, at virtually every point, supported by affidavit, documentary or deposition evidence that was developed during sharply limited discovery conducted during briefing of the motions below. Both the district court and the court of appeals considered the record developed in the limited discovery together with the allegations in the proposed Amended Complaint in deciding the motion to amend. 132 F.3d at 559 (A37); 1996 WL 407856 at *1 n.8 (A82).

[2] "TCA" refers to Rachel's Appendix to her appeal No. 96-4101 in the United States Court of Appeals for the Tenth Circuit.

the religious message of the assigned songs by instructing the choir class to imagine Jesus being crucified and "dying for our sins." A.C. ¶ 16(*i*); TCA 160, 225, 234, 251-52.

In 1994, a few months before Rachel entered Torgerson's class, he was reprimanded by the school district for his religious activities during his annual class trip. Torgerson responded by admitting in a letter to parents, "I have a little trouble with this separationist concept." TCA 584.

In the fall of 1994 — shortly after Rachel entered his class — when questioned about his promotion of religion in his class, Torgerson declared: "I bring religion into the classroom, and I ask my students to do the same." TCA 774.

Torgerson continued to schedule the performance of almost entirely Christian-oriented music during Rachel's year in his class, heavily weighting the repertoire with religious songs, including many contemporary "pop" Christian tunes. TCA 334-35, 342-43, 672-74. He instructed the class that a true appreciation of music comes through religious experience. TCA 770-71. Torgerson likewise continued to schedule many of the class performances in Mormon buildings and churches at which speakers endorsed the Mormon religion. A.C. ¶ 17(b)-(c); TCA 165-66, 601, 677A, 681. At one class performance, Torgerson offered a prayer to the "heavenly father." TCA 331, 338.

After Rachel and her family suggested that Torgerson reduce the number of and emphasis on religious songs, A.C. ¶ 19(a); TCA 172, 588, Torgerson criticized and ridiculed Rachel in class lectures for her concerns about his endorsement of religion. He stated, among other things, that Jews of all people should be tolerant of Mormons because they, like Mormons, were persecuted for their beliefs. A.C. ¶ 17(k); TCA 167-68, 772.

Torgerson also used class time and public school facilities to organize a covert Spring trip for the Christian members of the

class. A.C. ¶ 17(g)-(h); TCA 166-67, 329-30, 353-54, 785-86. Torgerson designed the covert trip to replace the annual class tour, which in prior years had included participation in Mormon religious services. Torgerson's tour was to feature, in the words of a flyer prepared for the tour, "expressions of faith and prayer." TCA 609. The three Jewish students in the class, including Rachel, were not invited to participate and were rebuffed when they inquired about it. A.C. ¶ 17(h); TCA 167, 330, 353-54, 784-85.

B. Procedural History

Rachel began this action for declaratory and injunctive relief and damages under 42 U.S.C. § 1983 on May 31, 1995.[3] The district court granted defendants' motion to dismiss the complaint. 900 F. Supp. 254 (D. Utah 1995). Shortly thereafter, Rachel filed a motion for reconsideration or in the alternative to amend the complaint, together with a proposed Amended Complaint supported by eight affidavits. TCA 144-260. The district court denied Rachel's motion for reconsideration, 900 F. Supp. 254, and, following a brief discovery period strictly limited in scope to the 1994-95 school year, denied leave to file the proposed Amended Complaint. 1996 WL 407856 (A78-A109).

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[3] Rachel initially sought a preliminary injunction barring the school from scheduling only religious songs for the class to sing at West High's graduation exercises that year. The district court denied the injunction. *Bauchman* v. *West High School*, No. 95CV-506G (D. Utah June 2, 1995) (transcript of hearing on Motion for TRO or Preliminary Injunction) (TCA 23A-23SS). On June 6, 1995, a Tenth Circuit panel, different from the one that ultimately heard the appeal, granted an injunction pending appeal with respect to the graduation ceremony. *Bauchman* v. *West High School*, No. 95-4084, 1995 WL 914614 (10th Cir. June 6, 1995) (TCA 23TT-23UU).

1. The District Court's Order

The district court held that under its reading of this Court's cases, "subjective intent plays no part" in Establishment Clause jurisprudence. *Id.* at *3 (A86). Rather, the court held that the conduct alleged in a complaint must be viewed as seen by an "objective" observer. In applying that standard, the court abandoned the presumptions normally accorded plaintiffs and instead weighed the evidence presented, including the credibility of affiants and deponents. The court rejected the specific allegations of the proposed amended complaint as "speculative or conclusory," "unsupported or at odds with an objective review of evidence developed in discovery," or otherwise not believable. *Id.* at *4-*9 (A90-A105). Based on these conclusions, the court held that filing the amended complaint would be "futile." *Id.* at *9 (A106).

2. The Tenth Circuit's Panel Decision

The Tenth Circuit affirmed the district court on other grounds, over a vigorous dissent by Judge Murphy. The majority criticized this Court's Religion Clause precedents as "muddled" and "uncertain[]," concluding that the "purpose" prong of this Court's Establishment Clause analysis was "an unworkable standard that offers no useful guidance." 132 F.3d at 551-52 (A17-A20), *citing Edwards* v. *Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting). It nevertheless undertook to apply the purpose and effect standards set out in the Court's opinions in *Edwards* and its predecessors in light of what it viewed as "the uncertainty surrounding the present Court's position regarding the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general." 132 F.3d at 552 (A20-A21).

In doing so, however, the panel majority held that an Establishment Clause complaint is subject to a particularly searching and selective inquiry. The majority rejected as "irrelevant" the allegations of the decades-long pattern and

practice of Torgerson's in-class endorsement of religion on the ground that they were not "temporally connected to the challenged activity." 132 F.3d at 560 (A38-A39). Rather, the majority held, the focus of the inquiry must be on "concrete manifestations of intent" made at the time of the challenged conduct. *Id.* (A39). Specifically,

> an Establishment Clause claim like the one before us must be supported by allegations of conduct or statements that *expressly* (without resorting to psychoanalysis) indicate the defendant believed his selection of songs and performance venues would serve a religious *purpose* . . . . .

Id. at 561 (A40) (first emphasis added).

The majority panel held that its new requirement of contemporaneous, express admission of an unconstitutional purpose was required by policy concerns. It distinguished the defendant's short-term "purpose" from his apparently longer-term "motive," explaining that "pragmatic limits on the nature of our inquiry into the 'actual' *purpose* of the challenged conduct" required a court to "stop short of an attempt to discern a defendant's psychological *motives vis à vis* his past conduct." *Id.* at 560 (A39) (emphasis in original). The majority also expressed concern that basing decisions on religious motives inferred from a teacher's past conduct would subject religious teachers to "a unique disability" and involve courts in educational decisions best left to local authorities. *Id.*

Although the district court had not applied this new standard, but rather a standard that did not even include a search for subjective intent, the panel majority simply incorporated the district court's erroneous decision with respect to the actual allegations of the proposed Amended Complaint:

> The specific nature of Ms. Bauchman's augmented allegations and the evidence pertaining to those allegations are thoroughly addressed in the district court's [opinion]. We can add little to the district court's analysis.

Id. at 561 (A40-A41) (citation omitted).

The panel majority did not separately address whether the proposed Amended Complaint adequately alleged governmental action with the *effect* of endorsing religion.

3. Judge Murphy's Dissent

In dissent, Judge Murphy concluded that "[t]he majority has so radically restricted pleading and proof of an improper purpose as to nullify the endorsement test's purpose prong," and that the panel's new test was "inconsistent with Supreme Court precedent." 132 F.3d at 563 (A45). Canvassing this Court's cases, the dissent found no support in Supreme Court Establishment Clause jurisprudence for the majority's distinction between the "purpose" and the "motive" of the defendant. *Id.* at 567-69 (A54-A58).

Further, the dissent found unpersuasive the majority's perceived "pragmatic limits" on the inquiry into purpose in Establishment Clause cases. The majority's exclusion of prior conduct from the purpose inquiry was inconsistent both with the general approach to intent evidence incorporated in Federal Rule of Evidence 404(b), which provides that evidence of past conduct is admissible to prove motive and intent, and with the Tenth Circuit's case law in examining analogous questions of intent under the anti-discrimination laws. *Id.* at 570-71 (A62-A65). The dissent also found the majority's concerns about burdening a religious teacher's beliefs to be unpersuasive, since the issue was not the religious person's beliefs, but that person's conduct endorsing or disapproving religion. *Id.* at 569 (A58-A59). Likewise, the concerns about burdening local school board policy were unfounded because the allegations in the proposed Amended Complaint did not attack a religiously neutral policy, but rather the actions of a teacher allegedly

undertaken for the direct and specific purpose of advancing religion. *Id.* (A60-61).[4]

4. Denial of Rehearing *En Banc*

An equally divided Tenth Circuit denied Rachel's petition for rehearing *en banc* without opinion. Chief Judge Seymour and Judges Ebel, Henry, Briscoe, Lucero and Murphy voted to grant rehearing. A1.

Reasons for Granting the Writ

The Tenth Circuit's holding relies on perceived uncertainty in this Court's Establishment Clause cases to erect a nearly insurmountable hurdle to pleading the religious purpose and effect of governmental conduct. This holding split the *en banc* Tenth Circuit and creates a conflict with the law of at least four other Circuits, which rely on indirect evidence of intent in Establishment Clause cases. Even aside from the undeniable importance of the constitutional question, the issue is, as the Tenth Circuit found, one of "acute public interest" in Utah, with its "unique social and political history" of "longstanding tension involving the separation of church . . . and state." 132 F.3d at 545 (A4-A5). This Court should grant the writ to clarify its jurisprudence and resolve the Circuit split.

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[4] Like the majority, the dissent did not discuss whether the allegations of the proposed Amended Complaint would state a claim under the "effects" prong of Establishment Clause analysis.

I.

The Decision Below Presents Important Questions Concerning the Standard of Proof in Establishment Clause Cases

This Court's decisions have not explicitly addressed the standard of proof in Establishment Clause cases, although a number of cases implicitly accept that all ordinary sources of proof are available to prove intent in such cases. *Edwards*, 482 U.S. at 590, 594 (considering history and context of state's action); *Wallace* v. *Jaffree*, 472 U.S. 38, 65 (1985) (Powell, J., concurring) (Court relied on "sequence and history of three Alabama statutes"); *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (*per curiam*) (concluding that pre-eminent purpose was "plainly religious" despite avowed secular purpose).

This case presents the question of the appropriate standard of proof of religious purpose in as clear a fashion as possible. Because the case was decided at the pleading stage, the rule erected by the opinion below is couched in sweeping terms unaffected by the particular facts of this case and will act to bar claims from the courthouse and chill otherwise meritorious claims from even being brought. If, as petitioner submits, the Tenth Circuit's standard is wrong, its rule will have an especially pernicious effect in a particularly important circuit for Religion Clause cases. Counsel contemplating bringing Establishment Clause cases in the Tenth Circuit will not bring those that cannot meet the newly raised pleading standards.

Moreover, this case provides an opportunity to clarify the vitality of the central concerns of the Establishment Clause in the face of the lower court's misreading of supposed uncertainty in this Court's cases. The Tenth Circuit mistook debates at the margins of Establishment Clause jurisprudence, involving the problem of discerning the purpose of a deliberative body, as license to impose a uniquely high pleading standard on all Establishment Clause cases. This case arises at the core of

Establishment Clause concerns — the use of a public school classroom as a preacher's pulpit — as to which, we submit, there should be no doubt as to the constitutional command.

The standard applied by the Tenth Circuit is clearly in error. This Court's cases consistently require that government must act for secular rather than religious purposes, particularly in the public schools. *See County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573, 592 (1989); *Edwards*, 482 U.S. at 584 ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not *purposely* be used to advance religious views that may conflict with the private beliefs of the student and his or her family.") (emphasis added); *id.* at 585; *Wallace*, 472 U.S. at 56; *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

While purporting to follow this Court's precedents in this area, the Tenth Circuit has effectively nullified purpose analysis entirely by imposing unprecedented obstacles to establishing religious purpose. Uniquely in the history of judicial analysis of an actor's state of mind, the court below bars all indirect evidence of intent and motive and requires that the actor have *expressed* his religious purpose *at the time* that he acted on it. 132 F.3d at 560-61 (A39-A40). As Judge Murphy pointed out in dissent, *id.* at 573-75 (A68-A74), the Tenth Circuit adopted a nearly insurmountable evidentiary standard for proving Establishment Clause violations, since — short of a statement at the time by the actor that "my purpose is to promote religion" — virtually no allegation will suffice. Even the stringent procedural safeguards that the criminal law requires do not demand the contemporaneous, explicit admission of wrongdoing by the malefactor. *Cf. Holland* v. *United States*,

348 U.S. 121, 139-40 (1954) (jury may convict defendant based solely on circumstantial evidence).[5]

This new requirement is inconsistent with centuries of Anglo-Saxon jurisprudence which recognizes that intent must commonly be proved by indirect evidence. *See* 2 John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 302 (Chadbourn Rev. 1979). The Federal Rules of Evidence expressly contemplate that a court can discern an individual's "motive . . . intent [and] knowledge" from past conduct. FED. R. EVID. 404(b); *see Turley* v. *State Farm Mutual Auto. Ins. Co.*, 944 F.2d 669, 673-74 (10th Cir. 1991).[6] This is especially true where civil rights are at stake. *See Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available . . . . The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."); *see also Bazemore* v. *Friday*, 478 U.S. 385, 402 n.13 (1986) (prior acts of

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[5] In proving motive or intent, "[e]vidence of a defendant's previous declarations or statements is commonly admitted in criminal trials . . . ." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) (*citing Haupt* v. *United States*, 330 U.S. 631, 642 (1947)).

[6] Every federal court of appeals has similarly permitted proof of intent through historical, circumstantial evidence. *See* 2 WEINSTEIN'S FEDERAL EVIDENCE § 404.22[1][a] (Joseph M. McLaughlin ed. 2d ed., 1997). In requiring elaborate and detailed allegations to support a claim of religious purpose, the Tenth Circuit's new standard is also inconsistent with Rule 8 of the Federal Rules of Civil Procedure, which requires only "a short and plain statement of the claim." FED. R. CIV. P. 8(a); *accord id.* 8(e)(1) (pleadings to be "simple, concise, and direct").

discrimination are "quite probative" of current discriminatory intent).[7]

The Tenth Circuit supported its "deferential" inquiry into the government's purpose with cases drawn from the inapposite legislative context. 132 F.3d at 552 (A20), *citing Edwards*, 482 U.S. at 636-37 (Scalia, J., dissenting). But, legislative purpose is not at issue here. This case concerns the problem of what Justice Kennedy termed "the eager proselytizer" in *County of Allegheny*, 492 U.S. at 678 (Kennedy, J., concurring in part and dissenting in part). Rather than disembodied statutory language, we have a flesh-and-blood government actor whose purpose is discernible through direct and circumstantial evidence.

The Tenth Circuit's distinction between "motive" and "purpose" in purported reliance on *Board of Education* v. *Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion), is a plain misreading of that case. *See* 132 F.3d at 567-69 (A55-A58). *Mergens* concerned an extracurricular religious group's use of public school facilities under the Equal Access Act, 20 U.S.C. §§ 4071-74. A plurality of this Court stated that "the possibly religious *motives*" that guided "some legislators" in voting for the act were irrelevant because the "legislative *purpose* of the statute" was what was relevant to determining the purpose of the statute. 496 U.S. at 249 (emphasis in original). Thus, the distinction between "motive" and "purpose" was not between some long-term and short-term purposes, as the Tenth Circuit thought, but merely between the purposes of individual legislators and the "legislative purpose" of the legislating body as a whole. *Mergens* has nothing to do

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[7] *See* Judge Murphy's dissent, 132 F.3d at 571 (A64) ("This circuit has long held that evidence of prior or concurrent acts of discrimination against others is relevant and admissible to prove an otherwise unrelated claim of discrimination.") (*citing Lowe* v. *Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1175 (10th Cir. 1996); *Honce* v. *Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993); *Pitre* v. *Western Elec. Co.*, 843 F.2d 1262, 1266-67 (10th Cir. 1988)).

with the evidence to be considered in determining an individual government actor's purpose.

The consequences of the decision below are especially severe for religious minorities who are most frequently Establishment Clause plaintiffs. By blocking access to the courts to redress minorities' constitutional grievances, the Tenth Circuit's decision strikes at those citizens most in need of the Establishment Clause's protection from government actors' promotion of religion. Moreover, the ruling creates a glaring split with several other circuits that, in affirming findings of religious purpose, have explicitly relied on the very type of evidence that the Tenth Circuit's decision would bar.

II.

The Decision Below Conflicts With the Third, Fifth, Eighth and Eleventh Circuits

In addressing Establishment Clause violations, the federal courts of appeals other than the Tenth Circuit routinely consider circumstantial and historical evidence of intent in analyzing government actors' purpose. The Third, Fifth, and Eleventh Circuits have each relied on logical inference and historical context to reach the conclusion that government actors harbored an actual religious purpose despite proffering an ostensible secular purpose, and the Eighth Circuit has said it would do so in an appropriate case.

In *American Civil Liberties Union* v. *Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*), the Third Circuit declared that the defendant school district harbored an actual religious purpose — despite its avowed secular purpose — in permitting student-led prayer at graduation ceremonies. The court relied on the defendant school board's historical conduct in concluding that its facially secular policy in fact constituted an "attempt to preserve the long standing practice of conducting invocation and benediction

prayer at graduation ceremonies." *Id.* at 1484 (internal quotations omitted). The Third Circuit pointed particularly to the defendant's previous practice of reviewing students' speeches, which it had ceased in order, the Court found, to distance itself from the content of religious presentations. *Id.*

Similarly, in *Ingebretsen* v. *Jackson Public School District*, 88 F.3d 274 (5th Cir. 1996), the Fifth Circuit held that a state statute permitting student-initiated prayer at public school events evinced an actual religious purpose, *id.* at 279, despite an express purpose to "accommodate the free exercise of religious rights of its student citizens," *id.* at 282 (Jones, J., dissenting from denial of reh'g *en banc*) (internal quotations omitted). In reaching this conclusion, the Fifth Circuit relied on the history and context of the government action, including a separate legislative resolution commending a school principal for promoting prayer and the prior "uproar over [the principal's] treatment after allowing prayer in his school." *Id.* at 279.

Nowhere did the Fifth Circuit rely on express, contemporaneous admissions of religious purpose. Rather, unlike the Tenth Circuit below, that court inferred religious purpose from the circumstantial evidence of indirectly related statements and the historical context demonstrating "a wave of public sentiment and indignation" over opposition to the promotion of religion in public schools. *Id.* at 277.

Likewise, in *Jager* v. *Douglas County School District*, 862 F.2d 824, 826 (11th Cir. 1989), the Eleventh Circuit analyzed the alleged "actual" religious purpose of a defendant school district's practice of permitting invocations before football games. These speeches "invoked reference to Jesus Christ" or requested "let us pray" and were delivered by announcers chosen by students. The court held that because the school district had rejected the alternative of pre-game speeches that did not refer to Jesus or prayer, it was "very clear that the School District's actual purpose in having pre-game invocations was religious." *Id.* at 830.

The Eleventh Circuit made no reference to express, contemporaneous statements that the defendants' believed their action would serve a religious purpose. Quite the contrary, the defendants in *Jager* — as did respondents below — vigorously denied the allegation of actual religious purpose, insisting that their actions were "wholly secular from start to finish." *Id.* at 829 n.11 (internal quotations omitted). Moreover, the Eleventh Circuit drew on the defendant's nearly forty-year history of allowing Christian ministers to deliver these pre-game invocations in determining the related "primary effect" test, *id.* at 831, which is linked with the "purpose" test in this Court's endorsement analysis, *see Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

Finally, one of the cases that the panel below relied on for its endorsement analysis was *Florey* v. *Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980). *See* 132 F.3d at 554 (A24). While *Florey* did not hold the particular policy at issue unconstitutional, it affirmed the principle that "[t]his does not mean, of course that religious ceremonies can be performed in the public schools under the guise of 'study.'" *Id.* at 1316. In other words, the Eighth Circuit would delve beyond the expressed intent of government actors to ascertain whether religious purposes lie beneath the "guise" of professed secular intent.

That these courts of appeals do not explicitly note that they rely on indirect evidence in reaching their conclusions should come as no surprise because the proof of an individual's intent through historical and circumstantial evidence is so routine as to be utterly unremarkable. *See generally* FED. R. EVID. 404(b). The Tenth Circuit's novel and entirely unwarranted requirement that an Establishment Clause claim "must be supported by allegations of conduct or statements that expressly (without resorting to psychoanalysis) indicate the defendant believed his [conduct] would serve a religious *purpose*" 132 F.3d at 561

(A40) (emphasis in original), stands in sharp contrast to other circuits' holdings and the settled law of proof of facts.

III.

The Tenth Circuit Improperly Exempted Establishment Clause Cases from the Settled Standards Governing Motions at the Pleading Stage

In addition to imposing an unprecedented and nearly insurmountable standard of pleading Establishment Clause violations, the Tenth Circuit also erred in exempting such cases from the uniform rule that at the pleading stage the district court must construe the allegations in the light most favorable to the plaintiff. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Tellingly, the Tenth Circuit recognized that the proposed Amended Complaint "clearly asserts defendants' conduct was motivated by a religious purpose" and includes "numerous allegations to support [Rachel's] claim that Mr. Torgerson has unconstitutionally promoted his religious beliefs in the classroom for over twenty years." 132 F.3d at 559 (A37). This conclusion would, in the ordinary case, have sufficed to reverse the district court.

The Tenth Circuit refused to apply the ordinary pleading test to the allegations here. Instead, in relying on the district court's opinion, it incorporated that court's completely inappropriate weighing of the evidence and rejection of allegations that the district court simply decided not to believe. *See* 132 F.3d at 561 (A40-A41); 1996 WL 407856 at *3-*9 (A89-A105). Because a court is not permitted to dismiss a complaint simply because it does not believe the plaintiff's allegations, *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989), the Tenth Circuit erred in upholding the district court's failure to construe Rachel's allegations in her favor. This error tainted the majority's evaluation of both the "purpose" and "effect" prongs, as well as its rejection of Rachel's original complaint, *see, e.g.*, 132 F.3d at 555-56 (A27-A28).

The Tenth Circuit's ruling departs so far from the established course of Supreme Court jurisprudence that summary reversal is appropriate. *See, e.g., Hughes* v. *Rowe*, 449 U.S. 5, 12 (1980) (*per curiam*) (summarily reversing improper dismissal of procedural due process claim at the pleading stage); *Cruz* v. *Beto*, 405 U.S. 319, 321-23 (1972) (summarily reversing improper dismissal of free exercise claim at the pleading stage).

Conclusion

For the foregoing reasons, the Court should grant certiorari and reverse the judgment of the court of appeals imposing unwarranted and improper procedural obstacles to pleading Establishment Clause claims.

Respectfully submitted,

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Of Counsel

April 28, 1998

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Nos. 95-4084 & 96-4101

CHERYL BAUCHMAN, as parent and guardian for Rachel Bauchman,

Plaintiff-Appellant,

v

WEST HIGH SCHOOL, et al.,

Defendants-Appellees.

ORDER
Filed January 28, 1998

Before **SEYMOUR, PORFILLO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO,** and **MURPHY**, Circuit Judges.

Cheryl Bauchman's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. The en banc court was polled on the rehearing suggestion. By an equally divided court the suggestion was denied. Chief Judge Seymour, and Judges Ebel, Henry, Briscoe, Lucero and Murphy voted to grant rehearing. The suggestion for en banc rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ L. Balzano
Deputy Clerk

CHERYL BAUCHMAN, as parent and guardian for Rachel BAUCHMAN,

Plaintiff-Appellant,

v.

WEST HIGH SCHOOL; SALT LAKE CITY SCHOOL DISTRICT; RICHARD TORGERSON; WILLIAM BOSTON; GENE BONELLA; TERESA PIELE; DOLORES RILEY; DARLINE ROBLES; DALE MANNING; MARY JO RASMUSSEN,

Defendants-Appellees,

and LEILA QUINONES BARELA, by and through her father, Luke J. Barela; LUKE J. BARELA, in his own capacity; TAMRA M. BADGER, by and through her parent and guardian, William A. Badger; WILLIAM A. BADGER, in his own capacity; CINDY R. BADGER; ERIC MICHAEL NIELSEN, by and through his parent and guardian Greg Nielsen; GREG NIELSEN, in his own capacity; JO RITA NIELSEN; HEATHER PETTIT, by and through her parent and guardian, RALPH PETTIT; RALPH PETTIT, in his own capacity; ELAINE PETTIT; JOY M. WARTHEN, by and through her parent and guardian, Lee Warthen; ALEXANDER B. WARTHEN, by and through his parent and guardian, Lee Warthen; LEE WARTHEN, in his own capacity; BARBARA WARTHEN; STEVEN C. EROR, JR., by and through his parent and guardian, Steven C. Eror; STEVEN C. EROR, in his own capacity; JUDY H. ERROR; JANE CURTIS, by and through her parent and guardian, Marvin R. Curtis, Jr.; MARVIN R. CURTIS, JR., in his own capacity; JOAN C. CURTIS,

Defendants-Intervenors.

PRESBYTERIAN CHURCH (U.S.A.); UNITED CHURCH BOARD FOR HOMELAND MINISTRIES OF THE UNITED CHURCH OF CHRIST; AMERICAN JEWISH COMMITTEE; ANTI-DEFAMATION

LEAGUE; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; UNION OF AMERICAN HEBREW CONGREGATIONS,

Amicus Curiae.

Nos. 95-4084, 96-4101.

United States Court of Appeals,
Tenth Circuit.
Dec. 18, 1997.

Affirmed and remanded with instructions; claims for injunctive and declaratory relief dismissed.

Murphy, Circuit Judge, concurred in part, dissented in part, and filed opinion.

***545** Andrew C. Hruska, New York City (Edward A. Harris, Georgina E. Hayden, Michael W. Martin and Joseph E. Neuhaus, New York City; Ross C. Anderson and Nathan B. Wilcox of Anderson & Karrenberg, Salt Lake City, UT, with him on the briefs), for Plaintiff-Appellant.

David J. Jordan, of Stoel Rives LLP, Salt Lake City, UT, and Debra J. Moore, Assistant Attorney General, Salt Lake City, UT (Kenneth R. Black of Stoel Rives LLP, Salt Lake City, UT, with them on the briefs), for Defendants-Appellees.

Eric W. Treene (Kevin J. Hasson and Nancy E. Smith of The Becket Fund for Religious Liberty, Washington, DC, with him on the briefs) for Defendants- Intervenors.

Marc D. Stern and Lois C. Waldman of The American Jewish Congress, New York City; Colby A. Smith and Alan H. Scheiner of Debevoise & Plimpton, New York City; Judith E.

Schaeffer and Elliot M. Mincberg of People for the American Way, Washington, DC; Steven K. Green and Julie A. Segal of Americans United for Separation of Church and State, Washington, DC, filed amici curiae briefs.

Before BRORBY, BARRETT and MURPHY, Circuit Judges.

BRORBY, Circuit Judge.

I. INTRODUCTION

Rachel Bauchman, by and through her mother and guardian, Cheryl Bauchman sued her music teacher, Mr. Richard Torgerson, West High School, the Salt Lake City School District and several West High School and School District Administrators, claiming that defendants violated the Establishment, Free Exercise and Free Speech clauses of the United States Constitution and her civil rights under 42 U.S.C. § 1983 (1994), her rights under the Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb (1994), and the Religion and Speech clauses of the Utah Constitution.

The constitutional issues raised in this appeal are issues of acute public interest--issues which evoke diverse opinions and strong emotions. The fact Ms. Bauchman's claims focus on religious neutrality in public schools only intensifies that interest and emotion.[1] This is no more true than in Salt Lake

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[1] As the United States Supreme Court has recognized:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought

City, Utah--a community and state whose unique social and political history reveals a longstanding tension involving the separation of church ("The Church of Jesus Christ of Latter-day Saints" or "Mormon Church") and state.[2]

Acknowledging this unique history and tension, we have taken particular care in studying Ms. Bauchman's claims and legal arguments. We take seriously our obligation to uphold the First Amendment of the Constitution, which fundamentally operates to protect minority interests. Our study of the relevant facts and law leads us to affirm the district court's dismissal of Ms. Bauchman's complaint and denial of her motion to amend the complaint.

II. BACKGROUND

A. SUMMARY OF FACTS AND ALLEGATIONS

Rachel Bauchman was a sophomore at Salt Lake City's West High School during the 1994-95 school year. During that same year, Ms. Bauchman auditioned for and was admitted into Mr. Richard Torgerson's a capella choir class (the "Choir"), an elective course offered for credit.

By way of her original complaint and proposed amended complaint, Ms. Bauchman, who is Jewish, generally alleges Mr.

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to keep strictly apart.
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 231, 68 S.Ct. 461, 475, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring).

[2] For an excellent discussion of this unique history see *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993) (Utah Supreme Court upheld Salt Lake City Council's practice of permitting prayer during opening portion of council meetings).

Torgerson "engaged for many years, and continues to engage, in the advocacy, promotion, endorsement and proselytizing of his [Mormon] religious beliefs and practices" during his public school classes and Choir performances. More specifically, she claims (1) as a member of the Choir she was required to perform a preponderance of Christian devotional music; (2) Mr. Torgerson selected songs for the religious messages they conveyed; (3) the Choir was required to perform Christian devotional songs at religious sites dominated by crucifixes and other religious symbols; (4) Mr. Torgerson selected religious sites for Choir performances with the purpose and effect of publicly identifying the Choir with religious institutions; (5) Mr. Torgerson berated and ostracized students, like herself, who dissented against his religious advocacy; (6) Mr. Torgerson covertly organized a Choir tour for select Choir members to perform religious songs at religious venues in southern California; and (7) Mr. Torgerson deliberately scheduled the Choir to sing two explicitly Christian devotional songs during West High School's 1995 graduation. Ms. Bauchman also presents a long list of Mr. Torgerson's alleged unconstitutional practices as a public school teacher beginning some seventeen years prior to Ms. Bauchman's enrollment in his class. She alleges the remaining defendants[3] had knowledge of but

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[3] During all relevant time periods, Defendant William Boston was Principal of West High School; Defendants Gene Bonella and Teresa Piele were assistant principals; Defendant Dolores Riley was the School District's Minority Liaison Coordinator; Defendant Darline Robles was the School District Superintendent beginning in January 1995; Defendant Dale Manning was the School District Interim Acting Superintendent from August 1994--January 1995; and Defendant Mary Jo Rasmussen was the Salt Lake City School Board President.

consistently failed to take any effective measures to stop Mr. Torgerson from promoting religion in his Choir classes.

Ms. Bauchman left West High School and enrolled in a private school for the 1996-97 school year--her senior year. Although she expressed a desire to sing in the Choir during her senior year, she declined an invitation to audition for the 1996-97 Choir. In June 1997, subsequent to oral argument in this appeal, Ms. Bauchman graduated from high school. Hence, she will no longer have occasion to enroll in Salt Lake City public schools.

B. PROCEDURAL HISTORY

Ms. Bauchman filed her complaint requesting declaratory and injunctive relief as well as damages at the end of the 1994-95 school year. Along with the complaint, Ms. Bauchman filed a Motion for a Temporary Restraining Order and Preliminary Injunction, seeking specifically to enjoin the Choir's planned performance of two songs at West High School's 1995 graduation, and more generally, to enjoin the defendants from compelling the Choir to perform or practice Christian devotional songs. Following an emergency hearing, which dealt solely with the evidence and issues pertaining to the graduation songs, the district court denied Ms. Bauchman's motion for emergency injunctive relief. The district court deliberately avoided taking evidence on or ruling with regard to Ms. Bauchman's request for broader, preliminary injunctive relief, noting that such request would require an evaluation of the merits of her constitutional claims as a whole. Ms. Bauchman nevertheless interpreted the district court's order as a final order denying all requested injunctive relief and filed her first appeal to this court.[4] ***547** Bauchman v. West High

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[4] Ms. Bauchman also requested an injunction pending appeal, which we granted, thereby enjoining the singing of two songs,

School, No. 95-4084.

Meanwhile, both Mr. Torgerson and the School District moved to dismiss Ms. Bauchman's complaint. They were joined by a group of Choir students and their parents who sought and were granted leave to intervene as defendants. For purposes of considering the motions to dismiss, the district court permitted Ms. Bauchman to file a "Verified Supplemental Pleading" containing allegations relating to the defendants' conduct at West High School's 1995 graduation exercises. After briefing and oral argument, the district court granted defendants' motions and dismissed the complaint.

Ms. Bauchman then filed a Motion to Alter or Amend Judgment and for Reconsideration of Order Granting Defendants' Motions to Dismiss pursuant to Fed.R.Civ.P. 59(e). In the alternative, Ms. Bauchman sought leave to amend her complaint and proffered a proposed amended complaint together with eight affidavits. The proposed amended complaint included additional allegations regarding the knowledge and actions of the individual school district defendants, numerous allegations pertaining to Mr. Torgerson's conduct prior to the 1994-95 school year and, for the first time, allegations that Mr. Torgerson selected religious songs and

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"The Lord Bless You and Keep You" and "Friends," by the Choir at West High School's 1995 graduation ceremonies. When a group of students and members of the audience sang "Friends" notwithstanding this court's injunction, Ms. Bauchman petitioned for an adjudication of contempt. We partially remanded the matter to the district court judge to act as special master to conduct whatever proceedings were necessary to resolve the allegations of the contempt petition. After careful review of the district court's report, findings of fact and recommendation, we denied Ms. Bauchman's contempt petition.

performance sites for the purpose of promoting religion. The district court denied Ms. Bauchman's motion for reconsideration, but held her motion to amend in abeyance pending discovery on the issue of whether, during the 1994-95 school year, Mr. Torgerson's "selection and rehearsal of Christian songs as part of the music class curriculum, and the performance of such songs by the [Choir] at religious venues was primarily for a secular purpose or primarily for the purpose of promoting or proselytizing religion." Following completion of discovery, Ms. Bauchman renewed her motion for leave to amend, electing to stand on the amended pleading proffered prior to discovery; she did, however, present the district court with numerous affidavits and deposition excerpts to consider in conjunction with the proposed amended complaint. The district court denied Ms. Bauchman's renewed motion after full briefing and oral argument.

Ms. Bauchman's second appeal contests the district court's orders (1) dismissing her complaint, (2) denying her motion for reconsideration and (3) denying her motion for leave to amend her complaint. *Bauchman v. West High School*, No. 96-4101. We consolidated Ms. Bauchman's two appeals for purposes of argument and disposition. Additionally, we permitted The American Jewish Congress to file a brief as *amicus curiae* in appeal No. 95-4084, and Americans United for Separation of Church and State and People for the American Way, Presbyterian Church (U.S.A.), United Church Board for Homeland Ministries of the United Church of Christ, The American Jewish Committee, Anti-Defamation League, General Conference of Seventh-Day Adventists, and Union of American Hebrew Congregations to file briefs as amici curiae in appeal No. 96-4101.

In June 1997, subsequent to oral argument, the Defendant-Intervenors filed a "Suggestion of Mootness." Mr. Torgerson and the School District joined in this suggestion, which asserts Ms. Bauchman's graduation from high school

renders her claims for injunctive and declaratory relief moot and requests that we dismiss those claims. Mr. Torgerson and the School District further assert Ms. Bauchman's damage claims under 42 U.S.C. § 1983 should be dismissed as (1) the individual defendants are qualifiedly immune, and (2) Ms. Bauchman has failed to allege sufficient facts to establish supervisory liability against the school district. In response, Ms. Bauchman denies any of her claims are moot and urges this court to retain jurisdiction over all aspects of her appeal, except for her Religious Freedom Restoration Act claims.[5]

III. MOOTNESS AND PENDENT JURISDICTION DETERMINATIONS

A. DISMISSAL OF APPEAL NO. 95-4084

As indicated above, Ms. Bauchman's first appeal challenges the district court's denial of her Motion for Temporary Restraining Order and Preliminary Injunction. Notably, however, this court's injunction pending appeal and subsequent order adopting the district court's recommendation to dismiss Ms. Bauchman's contempt petition effectively resolved all issues pertaining to the Choir's performance of "Friends" and "The Lord Bless You and Keep You" at West High School's 1995 graduation. After carefully examining the briefs and record in both appeals, we conclude that all issues concerning the merits of Ms. Bauchman's broader request for a preliminary injunction are subsumed into the issues raised in her second appeal, *Bauchman v. West High School*, No. 96- 4101.

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[5] As Ms. Bauchman does not appeal the dismissal of her Religious Freedom and Restoration Act claim, nor, apparently, the dismissal of her claims against the High School itself, we do not further address those claims.

We therefore dismiss appeal No. 95-4084 as moot and limit our discussion to the issues raised in appeal No. 96-4101.

B. DISMISSAL OF DECLARATORY AND INJUNCTIVE CLAIMS

This court may only adjudicate live controversies--controversies that exist at all stages of appellate review, not just on the date the lawsuit or appeal is initiated. *Fischbach v. New Mexico Activities Ass'n*, 38 F.3d 1159, 1160 (10th Cir.1994). We have held that when an individual graduates from school there no longer exists a live controversy necessary to support an action to participate in interscholastic activity. Accordingly, such action is deemed moot upon graduation. *Id.* at 1160. As Ms. Bauchman has now graduated from high school, there can be no reasonable expectation that she could again be subjected to the alleged unconstitutional conduct of Mr. Torgerson or the other Salt Lake City School District defendants. The defendants no longer have the power or opportunity to adversely affect Ms. Bauchman's constitutional rights. We therefore agree with defendants Ms. Bauchman's claims for injunctive relief are moot and dismiss her appeal as to those claims. For these same reasons we deny Ms. Bauchman's Application for an Injunction Pending Appeal filed August 21, 1996.

Although the question is a closer one, we further agree with defendants Ms. Bauchman's claims for declaratory relief are now moot. *Green v. Branson*, 108 F.3d 1296 (10th Cir.1997) controls our decision. Since Ms. Bauchman has successfully completed her secondary education, she is no longer subject to the curriculum chosen by or the conduct of Mr. Torgerson or the other school district defendants. The entry of a declaratory judgment in Ms. Bauchman's favor therefore would have no effect on the defendants' behavior toward her as a student. It would merely amount to a declaration the defendants had violated her constitutional rights. Thus, as in

Green, declaratory relief would be superfluous to the adjudication of Ms. Bauchman's § 1983 damages claim. *Id.* at 1299, 1300.

Ms. Bauchman's attempt to salvage her claims for declaratory relief by suggesting both she and her mother, Cheryl Bauchman, "maintain an active legal interest in the education of the younger Bauchman children," is to no avail. The only rights and interests asserted in the complaint and amended complaint are those personal to Ms. Rachel Bauchman. Her mother is referenced in the pleadings solely as the "parent and guardian" (i.e. representative) of Ms. Rachel Bauchman. Under these circumstances where (1) the parent is not described as a plaintiff, (2) no theories have been advanced to support an individual action by the parent, and (3) the complaint contains no allegations as to other children, we conclude Ms. Rachel Bauchman is the only plaintiff before the court. See *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir.1997); see also *Laurenzo v. Mississippi High Sch. Activities Ass'n*, 662 F.2d 1117, 1120-21 (5th Cir.1981). As the law requires that Ms. Bauchman's legal interest in the outcome of this appeal be greater than the mere satisfaction of a declaration she was wronged, we ***549** deem her claims for declaratory relief moot and dismiss her appeal as to those claims.[6]

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[6] Relying on *Anderson v. Green*, 513 U.S. 557, 115 S.Ct. 1059, 130 L.Ed.2d 1050 (1995) (*per curiam*), Ms. Bauchman requests that we remand her claims for declaratory and injunctive relief to the district court with instructions to vacate all parts of the district court's decisions that concerned those claims. While we agree with Ms. Bauchman the circumstances in this case involuntarily mooted her declaratory and injunctive claims, this case differs from Anderson in one important respect--in Anderson the Supreme Court dismissed the entire appeal, not just certain claims. *Id.* at 560, 115 S.Ct. at 1060-61. Since we proceed to decide the substantive merits of Ms.

C. REMAND FOR DISMISSAL OF STATE CONSTITUTIONAL CLAIMS

Ms. Bauchman asserts defendants' conduct violated her state as well as federal constitutional rights. More specifically, she alleges the defendants' policies and actions (1) "constitute the enactment of a law respecting the establishment of religion and infringing plaintiff's right of conscience in violation of Article I, Section 4 of the Constitution of Utah," (2) "have prevented [her] from freely exercising her own religion ... in violation of Article I, Section 4 of the Constitution of Utah," (3) "deprived [her] of her freedom of speech ... in violation of Article I, Section 15 of the Constitution of Utah," and (4) "deprived [her] of her rights to a public education free from sectarian control in violation of Article X, Section 1 of the Constitution of Utah." After disposing of Ms. Bauchman's federal claims, the district court dismissed Ms. Bauchman's state constitutional claims on the merits, concluding the state constitutional provisions upon which Ms. Bauchman relies "are not self-executing and contain no provisions or mechanism for a court action or remedy." The district court further ruled Ms. Bauchman's state law claims were barred by the Utah Governmental Immunity Act, Utah Code Ann., § 63-30-3(1).

The district court considered Ms. Bauchman's state law claims under the doctrine of pendent jurisdiction. Pendent jurisdiction is exercised on a discretionary basis, keeping in

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Bauchman's § 1983 claim, we decline to parse out and vacate certain portions of the district court's decision which, in fact, may be inseparable from the substantive issues we address. However, by dismissing Ms. Bauchman's appeal as to her claims for injunctive and declaratory relief we do not intend to prohibit the parties from making any appropriate requests to the district court regarding its final disposition of those claims.

mind considerations of judicial economy, convenience and fairness to the litigants. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); see also 28 U.S.C. § 1367(c)(3). The United States Supreme Court has counseled, pendent jurisdiction "need not be exercised in every case in which it is found to exist.... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139. If federal claims are dismissed before trial, leaving only issues of state law, "the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988); *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139.

The district court dismissed Ms. Bauchman's federal claims on the pleadings. We are upholding that decision. The state law questions presented in this appeal concern whether the Utah Constitution provides a private right of action against government establishment of religion, infringement of freedom of conscience and sectarian control of public schools. Utah courts have never squarely addressed this issue. Accordingly, any exercise of federal jurisdiction over Ms. Bauchman's state claims seriously implicates principles of comity. Under these circumstances, *Carnegie-Mellon University* and *Gibbs* counsel us to leave the development and application of private causes of action under the Utah Constitution to the Utah courts. See *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir.1995). The beneficial effect of permitting a Utah state court to determine the private rights of action under the Utah Constitution far outweighs any negative consequences (i.e., delay) of declining to exercise pendent jurisdiction. We therefore decline ***550** to review the merits of Ms. Bauchman's state law claims. Instead, we conclude the district court abused its discretion by exercising jurisdiction over those claims and remand Ms. Bauchman's state

law claims to the district court with instructions to dismiss without prejudice for want of federal jurisdiction.

IV. DISCUSSION

Having narrowed our adjudication to Ms. Bauchman's § 1983 claim, we proceed to address the threshold inquiry in the examination of such a claim: whether Ms. Bauchman has sufficiently alleged a violation of her clearly established constitutional rights. Because we hold the facts alleged by Ms. Bauchman cannot be held to state a claim for denial of her constitutional rights under the Free Speech, Free Exercise and Establishment clauses of the First Amendment, we do not further consider whether the various defendants are entitled to immunity. *Siegert v. Gilley*, 500 U.S. 226, 227, 233, 111 S.Ct. 1789, 1791, 1793-94, 114 L.Ed.2d 277 (1991); see also, *Doe v. Bagan*, 41 F.3d 571, 577 n. 7 (10th Cir.1994).

A. DISMISSAL OF MS. BAUCHMAN'S ORIGINAL COMPLAINT

The district court dismissed Ms. Bauchman's original complaint inter alia because the complaint and supplemental pleading, construed in a light most favorable to Ms. Bauchman, failed to allege sufficient facts to support her Establishment, Free Exercise and Free Speech claims. On appeal, Ms. Bauchman argues her original complaint satisfied liberal federal pleading requirements and adequately stated a cause of action under the federal constitution.

1. Standard of Review.

It is well established the sufficiency of a complaint to withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is a

question of law we review de novo.[7] *Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir.1995). In conducting such review, we must accept all the well-pleaded facts of the complaint as true and must construe them in the light most favorable to the plaintiff. *Id.*; *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 586 (10th Cir.1994). Dismissal is appropriate only if the plaintiff can prove no set of facts in support of the claim entitling her to relief. *Ramirez*, 41 F.3d at 586. However, counsel may not overcome pleading deficiencies with arguments that extend beyond the allegations contained in the complaint. The complaint itself must show Ms. Bauchman is "entitled to relief" under each claim raised. Fed.R.Civ.P. 8(a)(2).

2. Sufficiency of Allegations to Support Ms. Bauchman's First Amendment Claims

a. Establishment Clause.

The gravamen of Ms. Bauchman's complaint is her claim the defendants' policies and actions violate the Establishment Clause of the First Amendment. The First

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[7] We acknowledge this court has never settled on a standard for review of "constitutional facts" such as a district court's findings concerning First Amendment violations. *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir.), *cert. denied*, --- U.S. ----, 116 S.Ct. 1830, 134 L.Ed.2d 934 (1996); *Robinson v. City of Edmond*, 68 F.3d 1226, 1230 n. 7 (10th Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 1702, 134 L.Ed.2d 801. Nevertheless, we decline an opportunity to do so in this case as the facts are insufficient to support Ms. Bauchman's constitutional claims under either a de novo or a clearly erroneous standard.

Amendment states the government "shall make no law respecting an establishment of religion." This prohibition extends to state government, including the Utah public schools, by operation of the Fourteenth Amendment.

Determining whether Ms. Bauchman has alleged facts sufficient to support her claim that defendants have violated this prohibition is not an easy task, as there is no bright line standard we can apply. The United States Supreme Court repeatedly has recognized there can be no precise Establishment Clause test capable of ready application, and therefore has resisted confining such sensitive analyses to "any single test or criterion." *Lynch v. Donnelly*, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984). Moreover, the Supreme Court has never specifically addressed circumstances like those ***551** presented here, i.e., the constitutionality of a public school teacher's conduct in selecting course materials with religious content as part of a broader, secular curriculum. To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective. Indeed, many believe the Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger v. University of Virginia*, 515 U.S. 819, 861, 115 S.Ct. 2510, 2532, 132 L.Ed.2d 700 (1995) (Thomas, J. concurring), and in need of "[s]ubstantial revision." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 656, 109 S.Ct. 3086, 3134-35, 106 L.Ed.2d 472 (1989) (Kennedy, J. concurring in part and dissenting in part).

Our attempt to glean an appropriate standard for this case from existing, muddled Establishment Clause precedent begins with *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which is recognized as the benchmark case for Establishment Clause analysis. Applying *Lemon*, government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the

principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement. 403 U.S. at 612-13, 91 S.Ct. at 2111-12.

Beginning in the 1980s, however, the *Lemon* analysis came under vigorous attack by Justices and commentators alike. *See, e.g., County of Allegheny*, 492 U.S. at 655, 109 S.Ct. at 3134 (Kennedy, J. concurring in part and dissenting in part) (does not advocate or adopt *Lemon* test as primary guide for resolving difficult Establishment Clause issues); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 33, 109 S.Ct. 890, 909, 103 L.Ed.2d 1 (1989) (Scalia, J., dissenting) (use of *Lemon* to deny tax exemption not founded on Constitution, precedent, or history); *Edwards v. Aguillard*, 482 U.S. 578, 639-40, 107 S.Ct. 2573, 2606-07, 96 L.Ed.2d 510 (1987) (Scalia, J., dissenting) (criticizing inconsistent application of *Lemon* test); *Aguilar v. Felton*, 473 U.S. 402, 419, 105 S.Ct. 3232, 3241-42, 87 L.Ed.2d 290 (1985) (Burger, C.J., dissenting) (*Lemon* test too formalistic); Wallace v. Jaffree, 472 U.S. 38, 112, 105 S.Ct. 2479, 2518-19, 86 L.Ed.2d 29 (1985) (Rehnquist, C.J., dissenting) (*Lemon* test blurred and indistinct); Lynch, 465 U.S. at 679, 104 S.Ct. at 1362 (*Lemon* test not overriding criteria); *Mueller v. Allen*, 463 U.S. 388, 394, 103 S.Ct. 3062, 3066-67, 77 L.Ed.2d 721 (1983) (*Lemon* test nothing but helpful signpost); *Marsh v. Chambers*, 463 U.S. 783, 792-95, 103 S.Ct. 3330, 3336-38, 77 L.Ed.2d 1019 (1983) (Court ignored *Lemon* in favor of historical argument); see also, Stuart W. Bowen, Jr., *Is Lemon a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 St. Mary's L.J. 129 (1990) ("the Court should clarify its [Establishment Clause] analysis by abandoning *Lemon* and adopting a test that more accurately reflects the framers' original understanding of the word 'establishment' "). Acknowledging *Lemon*'s weaknesses, Justice O'Connor seized the opportunity in *Lynch v. Donnelly* to draft a concurring opinion encouraging the Court to refine the *Lemon* analysis to focus more on whether

the government is "endorsing" religion. 465 U.S. at 687-94, 104 S.Ct. at 1366-70.

Applying Justice O'Connor's refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that "religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 592-93, 109 S.Ct. at 3101; *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763, 115 S.Ct. 2440, 2447, 132 L.Ed.2d 650 (1995) (plurality); *Lynch* 465 U.S. at 687-94, 104 S.Ct. at 1366-70 (O'Connor, J., concurring). Recent cases suggest the purpose component of the endorsement test should evaluate whether the government's "actual" purpose is to endorse or disapprove of religion (*i.e.*, did the government intend to endorse or disapprove of religion); *Edwards*, 482 U.S. at 585, 107 S.Ct. at 2578; *Jaffree*, 472 U.S. at 56, 105 S.Ct. at 2489-90 (adopting Justice O'Connor's revision of the purpose component from *Lynch v. Donnelly*). The effect component, on the other hand, should evaluate whether a "reasonable observer," aware of the history and context of the community in which the conduct ***552** occurs, would view the practice as communicating a message of government endorsement or disapproval. *Capitol Square*, 515 U.S. at 779-81, 115 S.Ct. at 2455 (O'Connor, J., concurring).

Justice O'Connor's "endorsement test" is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims. *See* James M. Lewis & Michael L. Vild, *A Controversial Twist of Lemon: The Endorsement Test as the Establishment Clause Standard*, 65 Notre Dame L.Rev. 671 (1990). It would be wrong, however, to suggest the Court is unanimous in its adoption of the endorsement test. Moreover, even the Justices who have adopted the endorsement test do not agree on how it should be applied. *Id.* at 687-88.

For example, although the Court has indicated a failure to satisfy the purpose component of the endorsement test alone

is sufficient to invalidate government action, *Edwards*, 482 U.S. at 585, 107 S.Ct. at 2578; *cf.*, *id.* at 610, 107 S.Ct. at 2591-92 (Scalia, J., dissenting) (questioning the premise that government action can be invalidated on the basis of motivation alone, without regard to the effect), the Court rarely has decided cases based solely on the purpose component. See Jaffree, 472 U.S. at 75, 105 S.Ct. at 2499-500 (O'Connor, J. concurring). When it has, the overriding religious purpose of the government action has been obvious, leaving little need to elaborate on the appropriate scope of the purpose inquiry. See Edwards, 482 U.S. at 613, 107 S.Ct. at 2593 (Scalia, J., dissenting) (citations omitted); Lynch, 465 U.S. at 680, 104 S.Ct. at 1362-63 (citations omitted). To the extent the Court has delved into the government's subjective intent in its evaluation of the actual purpose, such approach has been openly condemned by two members of the present Court--Chief Justice Rehnquist and Justice Scalia. *Edwards*, 482 U.S. at 610, 107 S.Ct. at 2591-92 (Rehnquist, C.J, and Scalia, J., dissenting). According to Justice Scalia, who has proposed eliminating the purpose component altogether, discerning the government's subjective intent is "almost always an impossible task ... [t]o look for the sole purpose of even a single legislator is probably to look for something that does not exist." Id. at 636-37, 107 S.Ct. at 2605-06 (emphasis in original). Consequently, despite Sisyphean efforts, application of this component yields unprincipled results. *Id.* at 636, 107 S.Ct. at 2605; *Jaffree*, 472 U.S. at 112, 105 S.Ct. at 2518-19 (Rehnquist, J., dissenting).

Having struggled to meaningfully apply the purpose component of the endorsement test to the alleged Establishment Clause violation in this case, we agree it is an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect. Nevertheless, the uncertainty surrounding the present Court's position regarding

the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general, cautions us to apply both the purpose and effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon*, when evaluating Ms. Bauchman's Establishment Clause claim.[8] To survive a motion to dismiss, Ms. Bauchman ***553** must allege facts which, accepted as true, suggest a violation of any part of this analysis.

Ms. Bauchman's factual allegations concerning violation of her Establishment Clause rights fall into three categories: the performance of religious music, the performance at religious

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[8] The Court also has examined the coercive effect a school-sponsored religious activity may have on students. *See Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 2658, 120 L.Ed.2d 467 (1992). In Lee, the Court reaffirmed its longstanding recognition "that prayer exercises in public schools carry a particular risk of indirect coercion," and rejected the government's argument that providing a student with the option of not attending her high school graduation excused any inducement or coercion inherent in the ceremony itself. *Id.* at 592-99, 112 S.Ct. at 2658-62. According to the Court, it is overly formalistic to suggest a teenage student has a real choice not to attend her graduation--"one of life's most significant occasions." *Id.* at 595, 112 S.Ct. at 2659.

For reasons discussed more thoroughly below, we do not believe the singing of religious songs alone constitutes prayer. Nor do we consider the singing of religious songs in religious venues to constitute prayer without additional facts showing that such activity took place in a worshipful context. The facts as alleged by Ms. Bauchman simply do not identify a religious activity analogous to that addressed in Lee or other school prayer cases. Accordingly, we conclude a coercion analysis is inapplicable to the facts at hand.

sites, and the public ridicule and harassment she experienced as a result of the defendants' collective response to her objections. More precisely, Ms. Bauchman first claims she was repeatedly required to practice and publicly perform Christian devotional music with lyrics that sing praise to "Jesus Christ our savior" and "Jesus Christ our Lord," and that include other devotional references to God. She alleges a preponderance of the religious songs represented the works of contemporary Christian songwriters. Second, Ms. Bauchman claims Mr. Torgerson selected explicitly Christian religious sites such as the Church of the Madeleine, the First Presbyterian Church and Temple Square for Choir performances. She alleges these sites are dominated by crosses and other religious images. Finally, Ms. Bauchman alleges when she and her parents expressed their opposition to Mr. Torgerson's selection of songs and performance venues, Mr. Torgerson (1) criticized Ms. Bauchman in front of her classmates, "specifically and by inference"; (2) blamed Ms. Bauchman and her parents for the cancellation of the Choir's spring tour and rebuffed Ms. Bauchman's inquiry regarding the "Covert Tour" organized for Christian Choir members "under the guise of creating a Boy Scout Explorer Post"; (3) "directed the Choir class's attention to the fact that plaintiff is a Jew in such a way as to emphasize that her beliefs deviated from those of the Christian majority's"; (4) shared a letter he had received from Mr. Bauchman with the father of another Choir member "with the expectation and desire that [the Choir member's father] would distribute the letter to other parents of students in the Choir Class so as to incite those parents and their children to punish [Ms. Bauchman] and her parents by means of public ridicule and vilification"; and (5) stated he would not change his conduct. Ms. Bauchman alleges Mr. Torgerson "intended to promote hostility toward and ridicule of [Ms. Bauchman] by her fellow students as punishment for her assertion of her constitutional rights or in an attempt to pressure her to abandon those rights," and as a result

of Mr. Torgerson's actions, she "was subjected to public ridicule and humiliation, manifesting itself, in part, in racial and religious epithets from her fellow students."

We first consider whether allegations regarding the singing of religious songs at religious sites, alone, state a claim under the criteria we have set forth. Notably, in her original complaint, Ms. Bauchman alleges no facts to expressly indicate the purpose for selecting a majority of religious songs to be sung at religious venues or that the Choir curriculum has the effect on a reasonable observer of advancing or endorsing religious beliefs. Nor does she allege she was required to sing religious songs as part of a religious exercise per se. Rather, Ms. Bauchman simply alleges Mr. Torgerson selected and required her to perform a preponderance of "Christian devotional" songs in places dominated by crosses and other religious symbols. We will not infer an impermissible purpose or effect in the absence of any supporting factual allegations. *See Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362-63 (district court erroneously inferred from religious nature of creche that city had no secular purpose for display); *Mueller v. Allen*, 463 U.S. 388, 394- 95, 103 S.Ct. 3062, 3066-67, 77 L.Ed.2d 721 (1983) (Court is reluctant to attribute unconstitutional motives to the states). However, we will evaluate whether Ms. Bauchman's allegations concerning the selection and performance of songs alone suggest religious endorsement or the school's excessive entanglement with religion.

Endorsement

Vis à Vis Purpose

Notwithstanding existing uncertainty regarding the propriety or scope of this component of the endorsement test, certain principles governing our inquiry into the government's actual purpose are beyond dispute. Namely, the Constitution

does not require that the purpose of every government-sanctioned activity be unrelated to religion. *Jaffree*, 472 U.S. at 64, 105 S.Ct. at 2493-94; ***554** *City of Albuquerque v. Browner*, 97 F.3d 415, 428 (10th Cir.1996), *cert. denied*, --- U.S. ----, 118 S.Ct. 410, 139 L.Ed.2d 314 (1997). Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally. Courts also have recognized that "a variety of motives and purposes are implicated" by government activity in a pluralistic society. *Lynch*, 465 U.S. at 680, 104 S.Ct. at 1363. Accordingly, there is a legitimate time, manner and place for the discussion of religion in the public classroom. *School Dist. of Abington v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1315-16 (8th Cir.1980).

To sustain her Establishment Clause claim, Ms. Bauchman therefore must allege facts indicating the defendants have no "clearly secular purpose" for selecting songs with religious content and requiring the choir to perform in religious venues. *See Jaffree*, 472 U.S. at 56, 105 S.Ct. at 2489 (conduct violates the Establishment Clause if it is "entirely motivated by a purpose to advance religion"). In the alternative, Ms. Bauchman can allege facts showing that in spite of the existence of a legitimate secular purpose(s), the defendants' "actual" purpose is to endorse or disapprove of religion. *See County of Allegheny*, 492 U.S. at 592, 109 S.Ct. at 3100; *Edwards*, 482 U.S. at 585, 107 S.Ct. at 2578; *Jaffree*, 472 U.S. at 56, 105 S.Ct. at 2489-90; *Lynch*, 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J. concurring). Notably, however, we cannot allow Ms. Bauchman to support her claim with allegations focused solely on the religious component of classroom activity, since such approach would inevitably lead to invalidation of the activity under the Establishment Clause. *See Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362. At the same time, our inquiry into the government's purpose should be "deferential and limited."

Jaffree. 472 U.S. at 74, 105 S.Ct. at 2499 (O'Connor, J., concurring) We should resist attributing unconstitutional motives to the government, particularly where we can discern a plausible secular purpose. *See id.* at 74-75, 105 S.Ct. at 2499-500; *Mueller*, 463 U.S. at 394-95, 103 S.Ct. at 3066-67 (1983).

Here, we discern a number of plausible secular purposes for the defendants' conduct.[9] For example, it is recognized that a significant percentage of serious choral music is based on religious themes or text. *See, e.g., Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir.1995). Any choral curriculum designed to expose students to the full array of vocal

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[9] This is not a case in which we can evaluate the legitimacy and sincerity of a legislative statement regarding a statute's secular purpose, as the Supreme Court has so often done in its Establishment Clause cases. Moreover, since Ms. Bauchman's Complaint was dismissed pursuant to Fed.R.Civ.P. 12(b)(6), and our review therefore is limited to the allegations in her complaint, we cannot evaluate direct statements from Mr. Torgerson or the other defendants regarding the purpose for selecting religious songs and religious venues as part of the broader vocal music curriculum at West High School. We do not believe, however, that the procedural posture of this case should prevent us from acknowledging prevalent, archetypical secular purposes for defendants' conduct. *See Jaffree*, 472 U.S. at 75, 105 S.Ct. at 2499 (O'Connor, J., concurring) (reasoning even if there is no express secular purpose, a statute "should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence' ") (quoting *Epperson v. Arkansas*, 393 U.S. 97, 108, 89 S.Ct. 266, 272, 21 L.Ed.2d 228 (1968)). If we were so limited, Establishment Clause claims would be immune from attack under Fed.R.Civ.P. Rule 12(b)(6).

music culture therefore can be expected to reflect a significant number of religious songs. Moreover, a vocal music instructor would be expected to select any particular piece of sacred choral music, like any particular piece of secular choral music, in part for its unique qualities useful to teach a variety of vocal music skills (i.e., sight reading, intonation, harmonization, expression). Plausible secular reasons also exist for performing school choir concerts in churches and other venues associated with religious institutions. Such venues often are acoustically superior to high school auditoriums or gymnasiums, yet still provide adequate seating capacity. Moreover, by performing in such venues, an instructor can showcase his choir to the general public in an atmosphere conducive to the performance of serious choral music.

Ms. Bauchman does not allege in her complaint that defendants lacked a secular purpose. ***555** Ms. Bauchman further fails to allege any facts indicating (1) West High School's vocal music curriculum was out of step with traditional public high school vocal music curricula, (2) the acoustics and/or seating at the selected performance venues were unsuitable for the performance and public enjoyment of serious vocal music, or (3) the defendants' "actual" purpose was otherwise inconsistent with the prevalent secular objectives noted above. Ms. Bauchman's allegations instead focus solely on (1) the religious component of the Choir's activities--she was required to practice and perform songs with religious lyrics at sites dominated by crosses and other religious images, and (2) the defendants' conduct, not in selecting such songs and venues (the challenged activity), but in response to her objections--she was ridiculed for objecting to such songs and performance sites, and defendants inadequately and inappropriately responded to her objections. These allegations are insufficient to support her Establishment Clause claim given the obvious secular purposes for defendants' conduct. We see no reason to conclude that defendants' selection of religious songs and religious

performance venues serves an impermissible purpose simply because some of those songs and venues, which undisputedly represent only part of the Choir's repertoire and performance venues, may coincide with religious beliefs different from those of Ms. Bauchman. *See Edwards*, 482 U.S. at 605, 107 S.Ct. at 2589 (Powell, J., concurring) (emphasizing that a decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught happens to coincide or harmonize with the tenets of some or all religions) (quotations omitted); *Bowen v. Kendrick*, 487 U.S. 589, 604 n. 8, 108 S.Ct. 2562, 2571 n. 8, 101 L.Ed.2d 520 (1988). Accordingly, Ms. Bauchman's complaint fails to state an Establishment Clause claim under the purpose component of the endorsement test.

Vis à Vis Effect

To state a claim under this component of the endorsement test, Ms. Bauchman must allege facts indicating the Choir curriculum or Choir activities have a principle or primary effect of advancing or endorsing religion. United States Supreme Court precedent "plainly contemplate[s] that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683, 104 S.Ct. at 1364. However, not every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid. *Id.* Thus, as noted above, the Constitution does not forbid all mention of religion in public schools. The Establishment Clause prohibits only those school activities which, in the eyes of a reasonable observer, advance or promote religion or a particular religious belief. This is an objective inquiry, not an inquiry into whether particular individuals might be offended by the content or location of the Choir's performance, or consider such performances to endorse religion. *Gaylor*, 74 F.3d at 217.

We believe a reasonable observer aware of the purpose, context and history of public education in Salt Lake City, including the historical tension between the government and the Mormon Church, and the traditional and ubiquitous presence of religious themes in vocal music, would perceive the following with respect to Ms. Bauchman's factual allegations concerning the Choir curriculum and performance venues: the Choir represents one of Salt Lake City's public high schools and is comprised of a diverse group of students; many of the Choir's songs have religious content--content predominately representative of Judeo-Christian beliefs; in contrast to a church choir, this Choir also performs a variety of secular songs; the Choir's talent is displayed in the diverse array of songs performed and in a number of different public (religious and nonreligious) settings, all of which reflect the community's culture and heritage. Certainly, any given observer will give more or less meaning to the lyrics of a particular song sung in a particular venue based on that observer's individual experiences and spiritual beliefs. However, the natural consequences of the Choir's alleged activities, viewed in context and in their entirety by a reasonable observer, would not be the advancement or endorsement of religion. Ms. Bauchman's complaint therefore fails to ***556** support a claim that the Choir curriculum or Choir activities have a principle or primary effect of endorsing religion.

Entanglement

The entanglement analysis typically is applied to circumstances in which the state is involving itself with a recognized religious activity or institution. *See Florey*, 619 F.2d at 1318. For the reasons discussed above, we have rejected the notion that Ms. Bauchman's allegations regarding the Choir's singing of religious songs in religious venues alone support a claim that defendants' conduct endorses religion. Instead, we

believe a reasonable observer would conclude the selection of religious songs from a body of choral music predominated by songs with religious themes and text, and the selection of public performance venues affiliated with religious institutions, without more, amount to religiously neutral educational choices.[10] Consequently, we perceive no state involvement with recognized religious activity.

To the extent Ms. Bauchman suggests her allegations regarding past Spring Choir tours and a "covert" 1995 Spring tour are sufficient to support a claim of impermissible entanglement, we disagree. Ms. Bauchman fails to allege she participated in any past Spring tours and thus cannot be heard to claim her constitutional rights were violated as a result of any alleged Choir participation in religious services which may have occurred during those tours. Ms. Bauchman's allegation Mr. Torgerson "covertly organized a new Choir Class tour ... on public school property under the pretense of creating a Boy Scout 'Explorer Post' " lacks any facts to indicate such tour was conducted or actions were taken to involve the Choir in religious activity. In sum, we find no basis in Ms. Bauchman's complaint to suggest Defendants' alleged conduct amounts to unconstitutional entanglement.

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[10] Accordingly, we decline Ms. Bauchman's invitation to more closely evaluate the number and quality of religious songs selected for the Choir. The Constitution does not contemplate nor require judicial micro-management of the religious content of public education. Indeed, it would be entirely impractical to attempt such an endeavor.

Extraneous Allegations

Having determined Ms. Bauchman's allegations concerning the singing of religious songs at religious sites do not implicate the Establishment Clause, we must next address the relevance, if any, of her remaining allegations that she was subjected to public ridicule and harassment as a result of defendants' conduct. Certainly, Ms. Bauchman's allegations she was criticized and retaliated against for opposing the religious content of the Choir curriculum, taken as true, evidence a lack of sensitivity, crudeness and poor judgment unbefitting of high school students, their parents, and especially, public school teachers and administrators. However, such claims do not rise to the level of a constitutional violation. Nor can they be used to breathe constitutional life into otherwise unactionable conduct. The fact that the defendants did not change their behavior in accordance with Ms. Bauchman's demands and reacted negatively and/or offensively to those demands simply cannot be viewed as support for her claim that the Choir's performance of religious music at religious venues furthered a religious purpose, advanced or favored religion or a particular religious belief, or otherwise entangled the public school with religion. We reject this "backdoor" attempt to substantiate an otherwise flawed constitutional claim and conclude the district court properly dismissed Ms. Bauchman's Establishment Clause claim.

b. Free Exercise Clause.

Ms. Bauchman claims defendants violated the Free Exercise Clause by compelling her to participate in religious exercises in a public school setting, against her expressed desires and religious convictions. Her factual allegations in support of this contention can be summarized as follows: Mr. Torgerson repeatedly required Ms. Bauchman, a Jewish student,

to practice and publicly perform Christian devotional music containing lyrics referencing praise to Jesus Christ and God at religious sites dominated by crosses and other religious images, as part of the regular, graded, required Choir activities. Ms. Bauchman further alleges when she opposed such activity in the context ***557** of the Choir's Christmas concert series, Mr. Torgerson gave her the choice of not participating in the singing of songs she found offensive and told her that her nonparticipation would not adversely affect her Choir grade.[11] Relying largely on *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), Ms. Bauchman's counsel nevertheless concludes that such a choice is "constitutionally infirm", and proclaims that Ms. Bauchman's allegations therefore establish a Free Exercise violation.

To state a claim for relief under the Free Exercise Clause, Ms. Bauchman must allege something more than the fact the song lyrics and performance sites offended her personal religious beliefs. She must allege facts demonstrating the challenged action created a burden on the exercise of her religion. *United States v. Lee*, 455 U.S. 252, 256-57, 102 S.Ct. 1051, 1054-55, 71 L.Ed.2d 127 (1982). A plaintiff states a claim her exercise of religion is burdened if the challenged action is coercive or compulsory in nature. *See Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 448-51, 108 S.Ct. 1319, 1324-27, 99 L.Ed.2d 534 (1988);

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[11] We take judicial notice of the fact that Ms. Bauchman's opportunity to waive participation in the Christmas concerts or any other Choir activity was protected by Utah's "Recognizing Constitutional Freedoms in Public School Act," Utah Code Ann. § 53A-13-101.2, and the State Office of Education's regulations implementing that Act, Utah Admin. Code R. 277-105-5.

School Dist. of Abington, 374 U.S. at 222, 83 S.Ct. at 1571-72; *Messiah Baptist Church v. Jefferson County*, 859 F.2d 820, 824 (10th Cir.1988), *cert. denied*, 490 U.S. 1005, 109 S.Ct. 1638, 104 L.Ed.2d 154 (1989). Therefore, to state a Free Exercise claim, Ms. Bauchman must allege facts showing she was "coerced" into singing songs contrary to her religious beliefs. *Messiah Baptist Church*, 859 F.2d at 824. This she has failed to do.

On its face, Ms. Bauchman's complaint states the songs and performances were a required, graded component of Choir participation, but she was given the option of not participating to the extent such participation conflicted with her religious beliefs. Moreover, she was assured her Choir grade would not be affected by any limited participation. We conclude the fact Ms. Bauchman had a choice whether or not to sing songs she believed infringed upon her exercise of religious freedom, with no adverse impact on her academic record, negates the element of coercion and therefore defeats her Free Exercise claim. *See Grove v. Mead School Dist. No.* 354, 753 F.2d 1528, 1533 (9th Cir.) (court held no Free Exercise violation where student was given permission to avoid classroom discussion of book The Learning Tree), *cert. denied*, 474 U.S. 826, 106 S.Ct. 85, 88 L.Ed.2d 70 (1985); *Florey*, 619 F.2d at 1318 (court held no Free Exercise violation where school board expressly provided students may be excused from activities permitted under rules outlining the bounds of permissible school activities on religious holidays), *cert. denied*, 449 U.S. 987, 101 S.Ct. 409, 66 L.Ed.2d 251 (1980).

The district court correctly concluded *Lee v. Weisman* fails to support Ms. Bauchman's Free Exercise claim. In *Lee*, the Supreme Court rejected the notion that providing a student an option whether to participate in graduation was sufficient to avoid the Establishment Clause problem with graduation prayer. 505 U.S. at 594-95, 112 S.Ct. at 2659-60. The Lee Court did not address state coercion in the Free Exercise context. For Ms.

Bauchman to argue it is impermissible to excuse her from participation, but rather she must be allowed to participate in a Choir that only performs songs of the nature she demands, appears to be an attempt to bootstrap her Free Exercise claim with her Establishment Clause argument. Courts have long recognized that absent an Establishment Clause violation, the existence of a conflict between an individual student's or her parents' religious beliefs and a school activity does not necessarily require the prohibition of a school activity. Such conflicts are inevitable. *Florey*, 619 F.2d at 1318. In other words, while the Free Exercise clause protects, to a degree, an individual's right to practice her religion within the dictates of her conscience, it does not convene on an individual the right to dictate a school's curricula to conform to her religion.

***558** " '[T]he Free Exercise clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412, 83 S.Ct. 1790, 1798, 10 L.Ed.2d 965 (1963) (Douglas, J. concurring)). Accordingly, "public schools are not required to delete from the curriculum all materials that may offend any religious sensibility." *Florey*, 619 F.2d at 1318. Having concluded the State of Utah is not coercing Ms. Bauchman to violate her religious beliefs, we reject any invitation to obscure the appropriate scope of her Free Exercise claim by addressing issues of curriculum content. We leave those issues to our analysis of Ms. Bauchman's Establishment Clause claim, and uphold the district court's conclusion she failed to state a Free Exercise claim.

c. Freedom of Speech Clause.

Ms. Bauchman relies on the same allegations she asserted in her Free Exercise claim to support her Free Speech

claim. In essence, she argues the practice and performance of Christian devotional music at religious sites as part of the regular, graded, Choir curriculum have deprived her of her constitutional right to refrain from speaking.

The First Amendment certainly prohibits the government from compelling speech. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977). Here again, however, a threshold element of Ms. Bauchman's claim is coercion or compulsion. *See id.* at 714-15, 97 S.Ct. at 1435-36; *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 769-70 (10th Cir.1980), *cert. denied*, 450 U.S. 1050, 101 S.Ct. 1770, 68 L.Ed.2d 246 (1981). For the same reasons discussed in the context of Ms. Bauchman's Free Exercise claim, we conclude her complaint fails to allege facts sufficient to show she was coerced or compelled to engage in any Choir activities (practicing or performing songs she found offensive in venues she found offensive) against her will. The district court properly dismissed Ms. Bauchman's Free Speech claim for having failed to establish a necessary element of the alleged violation.

B. DENIAL OF OPPORTUNITY TO AMEND[12]

The district court concluded the only material difference between Ms. Bauchman's proposed amended complaint and her original pleadings was a "new" allegation or theory that it was not just the singing of Christian songs in religious venues that

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[12] We have fully addressed the issues Ms. Bauchman raised in protest of the district court's denial of her motion for reconsideration in our affirmance of the district court's order dismissing Ms. Bauchman's complaint. The remainder of our analysis therefore focuses on Ms. Bauchman's motion to amend her complaint.

violated her constitutional rights, but rather the fact that Mr. Torgerson selected and performed Christian music at religious venues for the specific purpose of promoting religion. In light of this new theory, the district court deferred ruling on Ms. Bauchman's motion to amend until the parties had an opportunity to complete limited discovery regarding the purpose of Mr. Torgerson's alleged unconstitutional conduct. The district court further limited discovery to Mr. Torgerson's actions during the year Ms. Bauchman was a Choir member, unless Ms. Bauchman could establish a "clear and concise nexus" between Mr. Torgerson's alleged past conduct and the injuries she claims she incurred in 1994-95.

After considering the parties' post-discovery evidence and argument pertaining to the motion to amend, the district court rejected Ms. Bauchman's efforts to resurrect her Free Exercise, Free Speech, Religious Freedom Restoration Act, and State constitutional claims, and reaffirmed its original ruling that "choir singing of religious music does not automatically equate with praying, and that the selection of Christian songs and the singing of Christian music in religious venues does not per se constitute a violation of the Establishment Clause." As to Ms. Bauchman's claim Mr. Torgerson pursued religious rather than secular purposes, the district court ruled that Ms. Bauchman's allegations and evidence, when judged by a reasonable ***559** observer standard, were insufficient to sustain an Establishment Clause claim. According to the district court, any pursuit of Ms. Bauchman's proposed amended complaint would be futile, as the allegations failed to state an Establishment Cause claim, and the undisputed materials facts would support a dismissal on summary judgment. The district court further concluded Ms. Bauchman's motion to amend was untimely, since the essential facts upon which she based her proposed amendment were known prior to dismissal of her original complaint.

Ms. Bauchman challenges these rulings, arguing (1) the

proposed amended complaint adequately states a cause of action and therefore is not futile; (2) the district court committed plain error by refusing to permit discovery of, or to consider, evidence of Mr. Torgerson's conduct prior to the 1994-95 school year; (3) the district court improperly applied a summary judgment standard to her motion to amend; and, (4) her motion to amend was timely. We consider Ms. Bauchman's arguments in turn.

1. Standard of Review.

To safeguard a plaintiff's opportunity to test her claims on the merits, Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of the court to amend the pleadings should be freely given when justice requires. Fed.R.Civ.P. 15(a). Accordingly, a district court must justify its denial of a motion to amend with reasons such as futility of amendment or undue delay. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir.1996). We review the district court's decision that Ms. Bauchman's motion to amend her complaint was both futile and untimely for abuse of discretion. *Hom*, 81 F.3d at 973.

2. Futility.

As to the allegations supporting Ms. Bauchman's Free Exercise and Free Speech claims, we agree with the district court there is no material difference between the two complaints. Consequently, because we hold the district court did not err in dismissing Ms. Bauchman's Free Exercise and Free Speech claims, we necessarily conclude the district court did not abuse its discretion by denying Ms. Bauchman's motion to amend. Further analysis beyond our evaluation of the district court's order dismissing those claims is unnecessary.

As to Ms. Bauchman's Establishment Clause claim, we note the following material differences between the original and amended complaints: (1) the amended complaint clearly asserts defendants' conduct was motivated by a religious purpose; (2) the amended complaint contains numerous allegations to support Ms. Bauchman's claim that Mr. Torgerson has unconstitutionally promoted his religious beliefs in the classroom for over twenty years; and (3) the amended complaint meticulously identifies each individual defendant together with his or her alleged responsibility for Mr. Torgerson's conduct or curriculum choices. Ms. Bauchman also presented the district court with eight affidavits in support of her amended complaint. Aside from Ms. Bauchman's affidavit concerning her Choir experiences during the 1994-95 school year and Ms. Deirdre Lynch's affidavit concerning the events at West High School's 1995 graduation exercises, the remaining affidavits describe Mr. Torgerson's alleged conduct as a music teacher during the two decades prior to the 1994-95 school year. Both parties relied on deposition transcripts and exhibits collected during the course of discovery to support their respective arguments regarding the propriety of Ms. Bauchman's motion to amend. The test is whether the proposed amendments, as supported by the affidavits or other evidence, cure the deficiencies in the original complaint. See, e.g., *Mountain View Pharmacy v. Abbott Lab.*, 630 F.2d 1383, 1386, 1389 (10th Cir.1980) (court of appeals gave plaintiffs benefit of any supporting allegations contained in sworn factual certificate submitted with the amended complaint when evaluating motion for leave to amend).

We first consider the allegations and evidence concerning Mr. Torgerson's conduct prior to the 1994-95 school year. Relying on Justice O'Connor's concurring opinion in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777-79, 115 S.Ct. 2440, ***560** 2454-55, 132 L.Ed.2d 650 (1995), Ms. Bauchman asserts Mr. Torgerson's "pattern of conduct"

dating back twenty years is necessary to understand the "pattern, history and context" of the alleged unconstitutional conduct and thus establish that Mr. Torgerson was furthering a religious purpose through his direction of Choir activities in 1994-95. Thus, she argues the district court improperly curtailed discovery to that period of time Ms. Bauchman was a Choir member. We disagree.

Ms. Bauchman's allegations regarding Mr. Torgerson's past conduct are irrelevant to her Establishment Clause claim for three reasons. First, as previously discussed, the "actual" purpose component of the endorsement analysis begins by asking whether there is a lack of a clearly secular purpose, not whether there is any religious purpose present. *See Jaffree*, 472 U.S. at 56, 105 S.Ct. at 2489-90; *Lynch*, 465 U.S. at 680-81, 104 S.Ct. at 1362- 63. This threshold determination is an objective one, removed from any subjective intent Mr. Torgerson may have. As previously discussed, Ms. Bauchman never alleged the defendants lacked a secular purpose.

Second, while Justice O'Connor noted a reasonable observer evaluating whether government conduct has the effect of endorsing religion "must be deemed aware of the history and context of the community and forum" in which the conduct occurs, she imparted such knowledge to the reasonable observer in the broad sense of community awareness, not in the sense that a reasonable observer would have knowledge of every alleged past constitutional violation of a particular defendant. *Capitol Square*, 515 U.S. at 776-81, 115 S.Ct. at 2454-55 (O'Connor, J., concurring). There simply is no indication Justice O'Connor intended her statements to condone the use of alleged past violations suffered by nonparties to bootstrap the constitutional claims of a present litigant. Ms. Bauchman has never claimed to be suing in a representative capacity for past Choir members. Her standing to sue therefore is limited to claims related to the infringement of her own constitutional rights while she was a Choir member. Accordingly, the

allegations and evidence relevant to Ms. Bauchman's claims are limited to defendants' conduct and events during the 1994-95 school year. The district court did not abuse its discretion by so limiting discovery and its analysis of Ms. Bauchman's claims.

Finally, any attempt to use allegations regarding Mr. Torgerson's past conduct to evidence a continual, controlling unexpressed or psychological motive to further a religious purpose by selecting religious songs and religious performance venues oversteps what we believe are pragmatic limits on the nature of our inquiry into the "actual" *purpose* of the challenged conduct. Put simply, our examination must stop short of an attempt to discern a defendant's psychological *motives vis à vis* his past conduct, underlying belief system or religious character. *See Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 249, 110 S.Ct. 2356, 2371, 110 L.Ed.2d 191 (1990) (plurality) (recognizing distinction between "actual" religious purpose and possible religious motives); *Jaffree*, 472 U.S. at 74, 105 S.Ct. at 2499 (O'Connor, J., concurring) (same). We must focus instead on objectively discernible conduct or communication that is temporally connected to the challenged activity and manifests a subjective intent by the defendant to favor religion or a particular religious belief.

We focus our inquiry on concrete manifestations of intent for a number of reasons. First, it is likely impossible to discern a sole psychological motive for Mr. Torgerson's conduct, past or present. *See Edwards*, 482 U.S. at 636- 37, 107 S.Ct. at 2605-06 (Scalia, J., dissenting). Additionally, we fear that to impose constitutional liability on curriculum decisions based on psychological motives inferred from a teacher's past conduct or religious character would be to (1) impermissibly subject religious teachers to a unique disability simply by virtue of their devout status, *see Mergens*, 496 U.S. at 248, 110 S.Ct. at 2370-71 (O'Connor, J., plurality opinion); *Edwards*, 482 U.S. at 615, 107 S.Ct. at 2594 (Scalia, J. dissenting) (court does not presume "the sole purpose of a law is to advance religion

merely because it is supported strongly by organized religions or by adherents of particular faiths"); (2) render legitimate ***561** public school curricula decisions affecting a diverse array of students vulnerable to protracted litigation initiated by a single, "offended" student, thereby involving the courts in educational policy decisions best left to the states and locally elected school boards, *Edwards*, 482 U.S. at 605, 107 S.Ct. at 2589 (Powell, J., concurring) (interference with the decisions of local public school authorities is "warranted only when the purpose for their decisions is clearly religious"); (3) discourage school districts from hiring teachers known to have strong religious beliefs; and (4) due to the inherent difficulty of attempting to discern an individual's unexpressed or psychological motive, exacerbate what is already perceived to be a morass of inconsistent Establishment Clause decisions. The Establishment Clause does not require such results. Instead, an Establishment Clause claim like the one before us must be supported by allegations of conduct or statements that expressly (without resorting to psychoanalysis) indicate the defendant believed his selection of songs and performance venues would serve a religious *purpose*--*e.g.*, constitute religious exercises, cause students to become religious, or cause students to adopt particular religious beliefs. Ms. Bauchman's allegations concerning Mr. Torgerson's past conduct provide no such indication of a religious purpose during the 1994-95 school year.

Next, we evaluate whether the remaining allegations or evidence change our earlier analysis that Ms. Bauchman failed to allege an Establishment Clause violation. Ms. Bauchman's proposed amended complaint and supplemental materials expand upon and emphasize certain conduct and events related to the allegations in her original complaint (*i.e.*, the performance of religious music, the performance at religious sites, and the public ridicule and harassment she experienced as a result of the defendants' collective response to her objections.) The specific nature of Ms. Bauchman's augmented allegations and the

evidence pertaining to those allegations are thoroughly addressed in the district court's Memorandum Decision and Order Denying Leave to Amend. *Bauchman v. West High Sch.*, 1996 WL 407856 (D.Utah May 30, 1996). We can add little to the district court's analysis. Having carefully reviewed the entire record before the district court, we respect Ms. Bauchman's individual perception as to the religious purpose and effect of these events and Mr. Torgerson's conduct, generally. Ultimately, however, we conclude that although Ms. Bauchman's allegations may support an observation that Mr. Torgerson is a religious man who struggles to expunge his spiritual convictions from his teaching, they fall short of supporting the required elements of an Establishment Clause claim--*e.g.*, Mr. Torgerson actually taught or proselytized his religious beliefs, advocated Christianity in general, condemned or criticized others' beliefs, conducted or permitted prayer or other religious exercises by or with Choir members.[13]

Apparently based on the district court's statement that her proposed amended complaint "would be subject to dismissal under a motion for summary judgment," Ms. Bauchman urges us to conclude the district court improperly applied a summary judgment standard when considering her motion to amend. The district court's order, read as a whole, makes clear the court did not grant summary judgment against Ms. Bauchman. Rather, the district court thoroughly considered Ms. Bauchman's amended complaint together with any support for her allegations from the affidavits, deposition transcripts and exhibits presented by both parties, and after such review concluded Ms. Bauchman still failed to state a claim under the

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[13] It follows that absent sufficient factual allegations to support an Establishment Clause claim, the remaining allegations in Ms. Bauchman's amended complaint concerning the identity, role and liability of individual defendants are of no import.

Establishment Clause. As discussed above, we agree with and uphold that conclusion. The district court went further to conclude the relevant undisputed facts related to defendants' conduct during the 1994-95 school year would subject Ms. Bauchman's proposed amended complaint to dismissal on summary judgment as well. This conclusion in and of itself did not convert the district court's analysis into a ruling on summary judgment. It simply provided an alternative ground for ***562** application of the futility doctrine. A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment. *See, e.g., AM Int'l, Inc. v. Graphic Management Assocs., Inc.*, 44 F.3d 572, 578 (7th Cir.1995); *Wilson v. American Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir.1989). Ms. Bauchman's argument to the contrary is without merit and seems disingenuous, since she herself participated in discovery and presented supporting materials for the court's consideration.

In sum, we agree with the district court that Ms. Bauchman's proffered amended complaint and supporting evidence and affidavits fail to cure the deficiencies in her original complaint. As such, the district court did not abuse its discretion by denying Ms. Bauchman's motion for leave to amend as futile.

3. Timeliness.

The district court cited Ms. Bauchman's failure to amend prior to a ruling on defendants' motion to dismiss and her failure to allege any "essential" facts not otherwise known prior to the dismissal of her original complaint as an alternative ground for denying Ms. Bauchman's motion to amend her complaint. We question the district court's rationale under circumstances where, as here, the court deliberately deferred ruling on Ms.

Bauchman's motion to amend pending the completion of additional, limited discovery related to her newly asserted theory that defendants' conduct was primarily for the purpose of promoting or proselytizing religion. We need not decide this issue, however, in light of our concurrence with the district court's decision that Ms. Bauchman's motion to amend was futile. Further discussion of the timeliness of an amended complaint proffered after dismissal and subsequent court-authorized discovery is best left for another day.

V. CONCLUSION

We acknowledge, as has the United States Supreme Court, that jurisprudence in this arena "is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." *Lee v. Weisman*, 505 U.S. at 598, 112 S.Ct. at 2661. The task of distinguishing between real constitutional threat and " 'mere shadow' " is a difficult one, *id.* (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 308, 83 S.Ct. 1560, 1616, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring)), and is perhaps more appropriately undertaken on summary judgment or after trial. However, for the reasons stated above, we conclude Ms. Bauchman has failed to demonstrate a real constitutional threat by way of her complaint or proposed amended complaint. We therefore AFFIRM the district court's dismissal of Ms. Bauchman's § 1983 claims. We also AFFIRM the district court's decision denying Ms. Bauchman leave to amend her complaint. We REMAND Ms. Bauchman's state constitutional claims to the district court, with instructions to dismiss those claims without prejudice for lack of federal subject matter jurisdiction. Finally, we DISMISS Ms. Bauchman's claims for injunctive and declaratory relief as moot.

MURPHY, Circuit Judge, concurring in part and dissenting in part.

I. INTRODUCTION

The court today holds that detailed allegations of deliberate, intentional, and purposeful endorsement of religion by a public high school teacher are insufficient to state an Establishment Clause civil rights claim. Majority Op. at 559-61. Because the majority's ruling, reasoning, and the necessary consequences thereof are inconsistent with the Establishment Clause as interpreted by the Supreme Court, I respectfully dissent.

The majority appears to reach its conclusion by finding a distinction between Richard Torgerson's[1] "motive" and "purpose." In ***563** light of this distinction, never before applied by this court or the Supreme Court in the context of an Establishment Clause civil rights claim, the majority holds that Torgerson's "psychological motive" in selecting the Choir's repertoire and performance venues is constitutionally irrelevant in determining whether he acted with the "actual purpose" of

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[1] Because the liability of each defendant in this case is in some sense derivative from Torgerson's liability, the majority opinion focuses exclusively on the alleged conduct of Torgerson in analyzing whether Bauchman's original or proposed amended complaint states a claim upon which relief can be granted. This separate opinion does likewise. This is not to say, however, that the governmental defendant, Salt Lake City School District, is in any way responsible for Torgerson's or the other individual defendants' alleged unconstitutional acts under the doctrine of respondeat superior. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978).

advancing religion. Id. at 560-61. Finally, taking its new constitutional rule of relevance to an extreme, the majority holds that Torgerson's alleged past acts of religious endorsement are also irrelevant because past acts demonstrate only "psychological motive," not "actual purpose." Id.

As detailed below, the majority's rigid view of pleading and proof of an Establishment Clause civil rights claim is inconsistent with Supreme Court precedent. In sharp contrast to the constitutional distinction drawn by the majority, the Supreme Court has routinely used the terms "motive" and "purpose" interchangeably in this context. Furthermore, the cases cited by the majority for the conclusion that motive is never relevant under the endorsement test's purpose prong are inapplicable and the policy concerns identified by the majority in support of its new rule of relevance are far from compelling. Finally, the majority's unexplained conclusion that past acts of misconduct are always irrelevant is inconsistent with the Federal Rules of Evidence and with precedent in an analogous area of the law.

The majority has so radically restricted pleading and proof of an improper purpose as to nullify the endorsement test's purpose prong. Beyond eviscerating the Establishment Clause as a protective citadel against religious and antireligious conduct by teachers and other public employees, the majority's approach defies a fundamental constitutional precept: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). Unfortunately, that "fixed star" shines less brightly today.

II. THE ENDORSEMENT TEST'S PURPOSE PRONG

The Establishment Clause of the First Amendment provides that the federal government "shall make no law respecting an establishment of religion." U.S. Const. amend. I. This prohibition extends to state governments and their political subdivisions by operation of the Fourteenth Amendment. *See Wallace v. Jaffree*, 472 U.S. 38, 48-49, 105 S.Ct. 2479, 2485-86, 86 L.Ed.2d 29 (1985); *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266-67, 8 L.Ed.2d 601 (1962). To determine whether Bauchman's original or proposed amended complaint states a claim upon which relief can be granted, this court must evaluate whether Torgerson's alleged conduct violates the Establishment Clause under the criteria set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111-12, 29 L.Ed.2d 745 (1971), and its progeny.

In *Lemon*, the seminal Establishment Clause case, the Supreme Court set forth a three-part test for evaluating the constitutionality of government action. Under that test, a government action will not violate the Establishment Clause as long as (1) it has a secular purpose, (2) does not have a principal or primary effect that either advances or inhibits religion, and (3) does not foster an excessive government entanglement with religion. See id.

Although the Supreme Court continued to apply the three-part *Lemon* test to Establishment Clause claims throughout the 1970s, *Lemon* came under increasing attack in the early 1980s. See Majority Op. at 551 (collecting cases attacking *Lemon*). In 1984, Justice O'Connor utilized the opportunity presented in *Lynch v. Donnelly*, 465 U.S. ***564** 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), to suggest a "clarification" of the Supreme Court's Establishment Clause jurisprudence. That "clarification" has come to be known as the endorsement test.

In Lynch, a divided Supreme Court held that the city of

Pawtucket's inclusion of a creche, along with a wide array of secular Christmas decorations, in a downtown Christmas display did not violate the Establishment Clause. *See id.* at 685, 687, 104 S.Ct. at 1365, 1366 (plurality opinion); id. at 694, 104 S.Ct. at 1370 (O'Connor, J., concurring). In a concurring opinion, Justice O'Connor identified the bedrock principles underlying the Establishment Clause and opined that there was not a clear nexus between those principles and the criteria set out in *Lemon*. According to Justice O'Connor:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions.... The second and more direct infringement is government endorsement or disapproval of religion....
>
> Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 [, 91 S.Ct. 2105, 2111-12, 29 L.Ed.2d 745] (1971), as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.

Id. at 687-89, 104 S.Ct. at 1366-68 (O'Connor, J., concurring) (citations and footnote omitted).

As to the endorsement component of her clarified Establishment Clause analysis, Justice O'Connor noted:

> The central issue in this case is whether Pawtucket has endorsed Christianity by its

display of the creche. To answer that question, *we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed.* The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. *Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.*

The purpose prong of the *Lemon* test asks whether government's *actual purpose is to endorse or disapprove of religion.* The effect prong asks whether, irrespective of

> government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. *An affirmative answer to either question should render the challenged practice invalid.*

Id. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring) (emphasis added).

In focusing specifically on the purpose prong of her endorsement test, Justice O'Connor noted that "[t]he purpose prong of the *Lemon* test requires that a government activity have a secular purpose." *Id.* (O'Connor, J., concurring). According to Justice O'Connor, however, "[t]hat requirement is ***565** not satisfied ... by the mere existence of *some secular purpose*, however dominated by religious purposes." *Id.* at 690-91, 104 S.Ct. at 1368 (O'Connor, J., concurring) (emphasis added). Thus, under the endorsement test formulated by Justice O'Connor, "[t]he proper inquiry under the purpose prong of *Lemon* . . .. is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691, 104 S.Ct. at 1368 (O'Connor, J., concurring).

The above-quoted passages establish that Justice O'Connor, the originator of the endorsement test, believes the proper focus of the purpose prong is the subjective purpose of the governmental actor. The question then becomes whether a majority of the Court has embraced the endorsement test and, if so, whether a majority has embraced Justice O'Connor's views of the purpose prong. Unfortunately, the task of parsing the Supreme Court's recent Establishment Clause cases is nothing short of Herculean. A careful reading of the Court's post-*Lynch* opinions, however, leads to the conclusion that a majority of the Court has adopted Justice O'Connor's emphasis on endorsement. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472 (1989) (holding for majority of court that "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either

has the purpose or effect of 'endorsing' religion"). Although the Supreme Court's discussion of the issue is perhaps opaque, recent cases support the conclusion that a majority of the Court would invalidate any governmental action subjectively intended to endorse religion.

In *Wallace v. Jaffree*, 472 U.S. 38, 56-61, 105 S.Ct. 2479, 2489-92, 86 L.Ed.2d 29 (1985), the Supreme Court struck down under *Lemon* 's purpose prong an Alabama statute authorizing a one-minute moment of silence in all public schools "for meditation or voluntary prayer." Citing to Justice O'Connor's concurring opinion and Justice Brennan's dissenting opinion in *Lynch*, the Court in *Wallace* noted that "even though a statute that is motivated in part by a religious purpose may satisfy [*Lemon* 's] first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." Id. at 56, 105 S.Ct. at 2489 (citation omitted). According to *Wallace*, "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.' " *Id.* (quoting *Lynch*, 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring)). In concluding that the statute at issue was actually motivated by a religious purpose, the Court examined the legislative history of the statute, focusing particularly on statements of the Act's sponsor that the motivation behind the Act was to return prayer to public schools. *See id.* at 56-57, 57 n. 43, 105 S.Ct. at 2489-90, 2490 n. 43.

It is clear that the Court focused on the Alabama legislature's subjective legislative purpose, rather than some possible objectively identifiable secular purpose for enacting the statute at issue. That focus on subjective legislative purpose is mirrored and amplified in the concurring opinions of Justices Powell and O'Connor. In his concurring opinion, Justice Powell stated the test as follows: "The first inquiry under *Lemon* is whether the challenged statute has a 'secular legislative purpose.' As Justice O'Connor recognizes, this secular purpose

must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.' " Id. at 64, 105 S.Ct. at 2494 (Powell, J., concurring) (citations omitted).

Employing the analysis she developed in *Lynch*, Justice O'Connor also found the Act at issue unconstitutional. As was the case with Justice Powell, it is clear that Justice O'Connor's opinion is based on an analysis of the legislature's subjective intent in passing the Act. *See id.* at 75-79, 105 S.Ct. at 2499-502 (O'Connor, J., concurring in judgment); *cf. Edwards v. Aguillard*, 482 U.S. 578, 585, 590-92, 107 S.Ct. 2573, 2578, 2581-82, 96 L.Ed.2d 510 (1987) (striking down Louisiana Creationism Act because legislature's "preeminent," "predominant," "primary," and "actual" purpose in passing the legislation was to advance religion); *id.* at 610, 107 S.Ct. at 2591-92 (Scalia, J., dissenting) ("Even if I agreed with the questionable premise that legislation can be invalidated under the Establishment ***566** Clause on the basis of its motivation alone, without regard to its effects, I would still find no justification for today's decision.").

The decisions in *Wallace* and *Edwards* illustrate that in recent years the Supreme Court has focused on the subjective intent of the governmental actor in analyzing whether governmental action fails for an improper purpose.[2] *Cf. Board*

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[2] According to Justice O'Connor, the Supreme Court's focus on "actual" subjective intent is the reason that so few cases are decided under *Lemon* 's purpose prong. Evidence of a subjective intent to advance religion is often difficult to develop. Nevertheless, Justice O'Connor, the developer of the endorsement test, seems undeterred by this fact. According to Justice O'Connor:

> It is not a trivial matter ... to require that the legislature manifest a secular purpose and omit

of Educ. v. Grumet, 512 U.S. 687, 737, 114 S.Ct. 2481, 2508, 129 L Ed.2d 546 (1994) (Scalia, J., dissenting) (noting that Court's decision to strike down specially created school district was based, in part, on its conclusion that creation of district was "religiously motivated"). Thus, it is equally clear that this court must focus on subjective purpose in deciding whether Bauchman's original or proposed amended complaint states a viable Establishment Clause civil rights claim.

III. THE MAJORITY OPINION

The majority begins its analysis of *Lemon* in a

> all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or a religious practice. It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.

Wallace v. Jaffree, 472 U.S. 38, 75-76, 105 S.Ct. 2479, 2499-500, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring in judgment).

seemingly unexceptional manner. It correctly notes that this court must apply the *Lemon* criteria as clarified by recent Supreme Court cases which focus on whether the challenged governmental action "endorses" religion. See Majority Op. at 550-53. As to the endorsement test, the majority notes the effect prong "should evaluate whether a 'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval." *Id.* at 552. The majority also grudgingly recites that the purpose prong encompasses a subjective analysis which "should evaluate whether the government's 'actual' purpose is to endorse or disapprove of religion." *Id.* at 552 (concluding that purpose prong contains a subjective test of "actual purpose" but opining that the purpose prong is an "unworkable standard" that "yields unprincipled results"). Finally, after again expressing its displeasure, the majority correctly concludes that a violation of **either** the subjective purpose prong or the objective effect prong is sufficient to invalidate the challenged practice under the First Amendment. *See id* at 552-53.

Thus, the majority's initial articulation of the endorsement test's purpose prong appears no different than the articulation in this separate opinion. *Compare id.* at 550-53 *with supra* Section II of this separate opinion. The majority departs, however, when it applies the endorsement test's purpose prong to Bauchman's proposed amended complaint. In concluding that the proposed amended complaint fails to state an Establishment Clause civil rights claim, the majority holds as follows:

> [A]ny attempt to use allegations regarding Mr. Torgerson's past conduct to evidence a continual, controlling unexpressed or psychological motive to further a religious purpose by selecting religious songs and religious performance venues oversteps what we

> believe are pragmatic limits on the nature of our inquiry into the "actual" *purpose* of the challenged conduct. Put simply, our examination must stop short of an attempt to discern a defendant's psychological ***567** *motives vis à vis* his past conduct, underlying belief system or religious character. *We must focus instead on objectively discernible conduct or communication that is temporally connected to the challenged activity and manifests a subjective intent by the defendant to favor religion or a particular religious belief.*

Majority Op. at 560 (citations omitted) (third emphasis added). The majority thereafter repeatedly declares that Torgerson's motivation in undertaking the acts at issue here is irrelevant and, furthermore, that his alleged past acts of endorsement are only demonstrative of motive and, therefore, are also irrelevant. See *id.* at 559-61. Finally, the majority concludes that an Establishment Clause civil rights claim will always fail at the pleading stage unless it is supported by allegations of "conduct or statements" which are "temporally connected to the challenged activity" and "expressly (without resorting to psychoanalysis) indicate the defendant believed his" actions would serve a religious purpose. *See id.*

The limitations imposed by the majority on the pleading and proof of an improper purpose under the Establishment Clause are unprecedented. The distinction drawn by the majority between motive and purpose finds no support in Supreme Court precedent. Furthermore, the majority's rigid views of allegations supportive of an improper purpose claim is at odds with the well- established rule that evidence of prior acts is relevant and admissible for the purpose of demonstrating "motive, opportunity, intent, preparation, plan, [and] knowledge." Fed.R.Evid. 404(b).

A. Supreme Court Precedent

The primary problem with the distinction drawn by the majority, and its concomitant rule of relevance, is that it finds no support in the Supreme Court's Establishment Clause jurisprudence.[3] In fact, the Supreme Court has routinely used the terms "motive" and "purpose" interchangeably in discussing and applying the endorsement test's purpose prong. *See, e.g., Wallace*, 472 U.S. at 56, 105 S.Ct. at 2489 ("For even though a statute that is **motivated** in part by a religious **purpose** may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely **motivated** by a **purpose** to advance religion." (citation omitted) (emphasis added)); *id.* at 59-60, 105 S.Ct. at 2491 ("We must, therefore, conclude that the Alabama Legislature ... was **motivated** by the same **purpose** that the Governor's answer the second amended complaint expressly admitted ...." (Emphasis added)); id. at 64 n. 6, 105 S.Ct. at 2494 n. 6 (Powell, J., concurring) (agreeing with majority that " 'a statute must be invalidated if it is *entirely motivated* by a purpose to advance religion' "); id. at 86-87, 105 S.Ct. at 2505 (Burger, C.J., dissenting) (dissenting from majority conclusion that Alabama moment of silence statute was motivated by an improper purpose on ground that there was

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[3] It is clear that the law generally draws a distinction between an actor's motive and his intent or purpose. *See* Black's Law Dictionary 1014 (6th ed.1990) (setting out differences between motive and intent). The question, however, is whether the Supreme Court has recognized that distinction in the context of the endorsement test's purpose prong and, more importantly, whether the Supreme Court has adopted a constitutional rule of relevance which makes evidence of motive invariably inadmissible to prove purpose. As detailed more fully below, the answer to both questions is no.

"not a shred of evidence that the legislature as a whole shared the sponsor's **motive**" (emphasis added)); *Edwards*, 482 U.S. at 613, 107 S.Ct. at 2593 (Scalia, J., dissenting) ("It is clear, first of all, that regardless of what **"legislative purpose"** may mean in other contexts, for the purpose of the *Lemon* test it means the "actual" **motives** of those responsible for the challenged action." (emphasis added)); *id.* at 614, 107 S.Ct. at 2594 (Scalia, J., dissenting) ("In all three cases in which we struck down laws under the Establishment Clause for lack of a secular **purpose**, we found that the legislature's sole **motive** was to promote religion." (emphasis added)); id. at 619, 107 S.Ct. at 2597 (Scalia, J., dissenting) (dissenting from majority's conclusion of improper purpose because court had "relatively little information upon which to judge the **motives** of those who supported the Act" (emphasis added)); *Bowen v. Kendrick*,***568** 487 U.S. 589, 602-03, 108 S.Ct. 2562, 2570-71, 101 L.Ed.2d 520 (1988) (repeatedly using the terms "motive" and "purpose" interchangeably in discussing whether act violated Establishment Clause); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 n. 4, 109 S.Ct. 890, 899 n. 4, 103 L.Ed.2d 1 (1989) (using terms interchangeably in concluding exemption violated Establishment Clause); *Grumet*, 512 U.S. at 737, 114 S.Ct. at 2508 (Scalia, J., dissenting) (noting that Court's decision to strike down specially created school district was based, in part, on its conclusion that creation of district was "religiously **motivated**" (emphasis added)). As this lengthy list of citations and quotations demonstrates, the Supreme Court has never drawn the sharp distinction between motive and purpose advocated in the majority opinion and has certainly never stated that a governmental actor's motives are immutably irrelevant to determining whether he acted with the purpose of approving or disapproving religion.

To the extent that the majority opinion relies on the Supreme Court's decision in *Board of Education v. Mergens*, 496 U.S. 226, 249, 110 S.Ct. 2356, 2371, 110 L.Ed.2d 191

(1990) (plurality opinion) to support its conclusion that Torgerson's motive is constitutionally irrelevant, the majority misreads the opinion. See Majority Op. at 560.

In *Mergens*, the Supreme Court upheld the Equal Access Act, 20 U.S.C. §§ 4071-4074, against, *inter alia*, an Establishment Clause challenge. *See* 496 U.S. at 247-53, 110 S.Ct. at 2370-74 (plurality opinion); *id.* at 260-62, 110 S.Ct. at 2377-78 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 262-70, 110 S.Ct. at 2377-83 (Marshall, J., concurring in the judgment). During the process of applying the purpose prong to the Equal Access Act, a plurality of the Court noted as follows: "Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." Id. at 249, 110 S.Ct. at 2371 (plurality opinion). Contrary to the majority's implicit assertion to the contrary, *Mergens* does not stand for the proposition that the personal motives of the sole state actor in this case, Torgerson, are invariably irrelevant under the endorsement test's subjectively oriented purpose prong.

There is a simple, clear, and threshold distinction rendering *Mergens* inapplicable to cases such as this one: *Mergens* did not involve a § 1983 civil rights claim against an individual state actor. *Mergens* instead involved the constitutionality of a legislative enactment. *See id.* at 247- 53, 110 S.Ct. at 2370-74 (plurality opinion). The majority's reliance on *Mergens* in addressing the wholly distinguishable setting in which Bauchman challenges the acts of a single state actor, who was solely or principally responsible for the challenged conduct, is misplaced.

The plurality in *Mergens* noted that any inquiry into the purpose of a legislative enactment should be deferential and limited. *See id.* at 248-49, 110 S.Ct. at 2370-71 (plurality

opinion). Such deference is predicated on the Supreme Court's respect for the role of Congress as a coequal branch of the federal government. *See id.* at 251, 110 S.Ct. at 2372-73 (plurality opinion). Nothing in this case indicates that the Court is likely to apply a similarly deferential standard to the actions of an individual state actor in an Establishment Clause civil rights suit under § 1983. In contrast to its deference to the collective actions of legislatures, the Supreme Court has specifically noted the unique power which public school teachers may wield over students. *See Edwards*, 482 U.S. at 583-84, 107 S.Ct. at 2577-78. More importantly, the Supreme Court refused to analyze the motives of individual legislators in *Mergens* because the individual views of a single legislator say little about the legislative body's collective purpose in enacting a statute. *See Mergens*, 496 U.S. at 249, 110 S.Ct. at 2371 (plurality opinion). Because it is the collective purpose of the legislative body that is at issue when a statute is challenged under the Establishment Clause, a particular legislator's impermissible motives for introducing or voting for a statute are irrelevant. The motive, intent, and purpose of a state actor solely or principally responsible for conduct ***569** challenged under § 1983, however, is paramount.

B. Constitutional Policy

In addition to its reliance on *Mergens,* the majority asserts that constitutional policy compels indifference to Torgerson's individual motivation. According to the majority, "to impose constitutional liability on curriculum decisions based on psychological motives inferred from a teacher's past conduct" would (1) "impermissibly subject religious teachers to a unique disability simply by virtue of their devout status"; (2) render legitimate curriculum decisions vulnerable to litigation and involve "the courts in educational policy decisions best left to the states and locally elected school boards"; (3) discourage

school districts from hiring teachers known to have strong religious beliefs; and (4) "exacerbate what is already perceived to be a morass of inconsistent Establishment Clause decisions." Majority Op. at 560- 61. Unfortunately, the majority merely recites this litany and does not further elaborate.

The majority's concern that religiously devout teachers will be disabled if their motives are deemed probative, the first and third policy arguments in the majority's litany, confuses the concepts of belief and purpose. Torgerson's religious beliefs are irrelevant to the determination of his purpose. *See Mergens*, 496 U.S. at 248, 110 S.Ct. at 2370-71 (plurality opinion). Allegations that Torgerson included religious songs in the Choir's repertoire, that he chose religious sites for performances, or that he is a devoutly religious man are insufficient to state a civil rights claim under the endorsement test's purpose prong. *See Edwards*, 482 U.S. at 605, 107 S.Ct. at 2589 (Powell, J., concurring); *see also infra* (concluding that Bauchman's original complaint fails to state a civil rights claim under the Establishment Clause). But merely because a religious person is not constitutionally presumed to have a religious purpose does not immunize that person from civil rights liability for intentional endorsement or disapproval of religion.[4]

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[4] To the extent that the majority's public policy concerns focus on the dangers of considering a governmental actor's deeply held religious beliefs, as opposed to specific instances of past religious endorsement or disapproval, the concerns identified by the majority are not triggered in this case. Bauchman never argued on appeal that allegations regarding Torgerson's religious beliefs, either standing alone or in combination with his alleged past acts of misconduct, were sufficient to state a civil rights claim under the Establishment Clause. Instead, she has simply argued the unremarkable position that Torgerson's alleged past acts of misconduct, set out more fully below, are

The second policy in the majority's litany, the importance of local control over education, is equally unavailing. This court has not been asked to overturn a religiously neutral state or local school board policy, but has simply been asked whether the following allegation states a claim upon which relief can be granted: an individual teacher undertook certain actions in a secondary education classroom for the direct and specific purpose of advancing religion. Answering that question in the affirmative would not necessarily subject local school boards to any special danger. Instead, it would provide content to the Establishment Clause by prohibiting public school teachers from purposefully using their positions in the classroom to endorse or disapprove religion. Furthermore, although states and local school boards are "generally afforded considerable discretion in operating public schools,"[5] the Supreme Court has recognized "that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Educ. v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806-07, 73 L.Ed.2d 435 (1982). Moreover, the Court has repeatedly expressed the necessity of "monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 482 U.S. at 583-84, 107 S.Ct. at 2577-78. Its reasoning is unassailable:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to ***570** advance

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relevant to the question of whether he chose the Choir's repertoire and performance venues for the purpose of advancing religion.

[5] *Edwards*, 482 U.S. at 583, 107 S.Ct. at 2577.

> religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools...."

Id. at 584, 107 S.Ct. at 2577-78 (quoting *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231, 68 S.Ct. 461, 475, 92 L.Ed. 649 (1948) (Opinion of Frankfurter, J.)) (citations omitted) (alteration and ellipses in original).

Finally, the majority concludes its litany with the wholly unsupported suggestion that to attribute any significance to a public school teacher's motives will "exacerbate what is already perceived to be a morass of inconsistent Establishment Clause decisions." Majority Op. at 561. Conceding for the sake of argument the characterization of the Supreme Court's Establishment Clause jurisprudence as being in "hopeless disarray" and in need of "[s]ubstantial revision," *id.* at 551, attributing constitutional significance to the motives of a public school teacher, who is principally, if not solely, responsible for the challenged conduct neither contributes to the disarray nor creates the need for revision. Consideration of the motivation of a teacher who is alleged to have deliberately, intentionally, and purposefully endorsed or disapproved of religion will not further complicate Establishment Clause jurisprudence.

C. Relevance of Prior Acts

It must be further noted the majority's conclusion that Torgerson's alleged past acts are irrelevant is suspect for the following three reasons: (1) the majority offers no reasoning at all for its conclusion that Torgerson's past acts of misconduct only demonstrate a "continual, controlling ... motive to further a religious purpose," Majority Op. at 560, as opposed to a continual, controlling purpose to endorse religion; (2) the conclusion of irrelevance is at odds with Federal Rule of Evidence 404(b), which specifically provides that evidence of past conduct is admissible for the purpose of proving motive, intent, and knowledge; and (3) the conclusion of irrelevance is inconsistent with analogous case law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17.

At the very heart of the majority's decision in this case is the conclusion that Torgerson's past conduct of endorsement is irrelevant because it only serves to demonstrate a continuing psychological "motive" to "further a religious purpose," rather than a distinct purpose to endorse religion.[6] Majority Op. at 560; *see also id.* ("[A]llegations and evidence relevant to Ms. Bauchman's claims are limited to defendants' conduct and events during the 1994-95 school year."). The problem is that the majority never explains why past instances of misconduct only show a **continuing motive** rather than a **continuing purpose** to advance religion. Under the majority's rigid rule of relevance, a past expression of "actual purpose" is apparently converted into an irrelevant expression of motive by the mere

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[6] It is worth noting, albeit repetitiously, that the Supreme Court, using language identical to that rejected by the majority, has held "the First Amendment requires that a statute must be invalidated if it is entirely **motivated** by a **purpose** to advance religion." *Wallace*, 472 U.S. at 56, 105 S.Ct. at 2489 (emphasis added).

passage of time. Under this novel view of relevance, an admission by a public school teacher that she constructed the curriculum for the direct **purpose** of advancing religion is somehow converted into a mere expression of **motive** during a subsequent year, even if the curriculum in question remains unchanged. Unfortunately, the majority has not cited any support for this novel proposition. A review of the relevant Supreme Court jurisprudence reveals the reason: no support for the proposition exists. Even assuming for the sake of argument that the majority's novel rule of past conduct is correct and allegations of Torgerson's past conduct of endorsement are somehow converted ***571** into mere expressions of motive, that motive is still relevant to prove that Torgerson acted with an improper purpose during the year in question.

The majority's conclusion that allegations concerning Torgerson's past acts of endorsement are irrelevant is also inconsistent with the Federal Rules of Evidence. The Federal Rules of Evidence provide as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...." Fed.R.Evid. 404(b). According to at least one noted commentator, "Rule 404(b) adopts an inclusionary approach, generally providing for the admission of all evidence of other acts that is relevant to an issue in trial, excepting only evidence offered to prove criminal propensity." Weinstein's Federal Evidence § 404.20[3] (Joseph M. McLaughlin ed., 2d ed.1997). Furthermore, prior acts or wrongs are most frequently admitted in both civil and criminal trials to "show a pattern of operation that would suggest intent." *Id.* § 404.22[1][a]; see also *Turley v. State Farm Mut. Auto. Ins. Co.*, 944 F.2d 669, 674-75 (10th Cir.1991). As detailed below, a pattern of conduct that would suggest intent is exactly what Bauchman alleged in her amended complaint. The majority's

conclusion that Torgerson's alleged past acts are irrelevant is clearly at odds with the "inclusionary approach" to such evidence set forth in the Federal Rules.

Finally, the majority's exclusion of Torgerson's alleged prior acts of misconduct is also inconsistent with this circuit's treatment of past misconduct in Title VII discrimination cases. Title VII cases are particularly instructive on the admissibility of past acts of misconduct. In both the Title VII arena and under the endorsement test's purpose prong an otherwise perfectly lawful act becomes unlawful if it is undertaken with an interdicted state of mind.

This circuit has long held that evidence of prior or concurrent acts of discrimination against others is relevant and admissible to prove an otherwise unrelated claim of discrimination. *See Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1175 (10th Cir.1996); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir.1993); *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1266-67 (10th Cir.1988). As this court explained in *Pitre*, prior acts of discrimination are " 'quite probative' " of the question whether current conduct is discriminatory. 843 F.2d at 1267 (quoting *Bazemore v. Friday*, 478 U.S. 385, 402 n. 13, 106 S.Ct. 3000, 3010 n. 13, 92 L.Ed.2d 315 (1986)). This is especially true when the decision-making process has remained unchanged and the same person or persons are still in charge of making the hiring, promotion, and termination decisions, a circumstance, as detailed below, closely analogous to that in the instant case. *See id.* In those situations, "evidence of prior discrimination 'might in some circumstances support the inference that such discrimination continued.' " *Id.* (quoting *Bazemore*, 478 U.S. at 402, 106 S.Ct. at 3010). In light of the analogous nature of the inquiries under Title VII and Establishment Clause claims such as this, it seems particularly incongruous to exclude past acts of misconduct under the endorsement test when those same prior alleged acts of

misconduct would be admissible to prove discriminatory intent under Title VII.

D. Conclusion

The distinction drawn by the majority between motive and purpose is at odds with the Supreme Court's consistent practice of using the terms interchangeably. At a minimum, even if an appropriate distinction can be drawn between the two, the Supreme Court's jurisprudence offers no support for the assertion that Torgerson's motive, while not dispositive, is irrelevant for the purpose of pleading and proving that he acted with an improper purpose. Furthermore, the policy arguments advanced by the majority in support of its position are far from compelling. Finally, the majority's rigid rule of relevance is inconsistent with the "inclusive approach" to such evidence embodied in the Federal Rules of Evidence and is inconsistent with this circuit's precedent in the analogous area of Title VII.

*572 III. APPLICATION OF THE ENDORSEMENT TEST'S PURPOSE PRONG

A proper application of the endorsement test's purpose prong justifies the district court's dismissal of Bauchman's original complaint for failure to state a claim. The district court erred, however, in denying Bauchman an opportunity to amend her complaint.

A. Bauchman's Original Complaint

As aptly noted by the majority, the gravamen of Bauchman's original complaint is as follows: the inclusion of religious songs in the Choir's repertoire and the performance of those songs at religious sites, standing alone, constituted a violation of the Establishment Clause. Bauchman does not

allege in her original complaint that Torgerson selected either the Choir's repertoire or places of performance with the subjective purpose of advancing religion. Instead, Bauchman's allegations are limited to an implicit claim that the actions of Torgerson had the effect of endorsing religion. See Majority Op. at 553 (explaining at length basis for Bauchman's original complaint). So interpreted, the district court did not err in dismissing Bauchman's original complaint.

The inclusion of religious songs as part of a choir repertoire and the performance of a high school choir at churches, synagogues, wards, and other religious venues, standing alone, do not constitute per se violations of the Establishment Clause. *See Edwards*, 482 U.S. at 605, 107 S.Ct. at 2589 (Powell, J., concurring). As noted by the Fifth Circuit in *Doe v. Duncanville Independent School District*, 70 F.3d 402, 407 (5th Cir.1995), a large percentage of choral music is "based on sacred themes or text." Given the prevalence of devotional lyrics in choral music, no reasonable person could conclude that the inclusion of religious songs in the Choir's repertoire had the effect of endorsing religion. Furthermore, no reasonable, objective person could conclude that, standing alone, the inclusion of religious venues in the Choir's performance sites had the effect of endorsing religion. As a consequence, Bauchman's original complaint, which does not allege Torgerson acted with the purpose of advancing religion, fails to state a claim upon which relief can be granted.

B. Bauchman's Amended Complaint

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend the pleadings after the time for amending as a matter of right "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). In *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the

Supreme Court explained the approach that district courts should take in deciding whether to permit a party to amend the pleadings:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Id. at 182, 83 S.Ct. at 230. This court reviews the district court's decision to deny Bauchman's motion to amend for abuse of discretion. *See Hom v. Squire*, 81 F.3d 969, 973 (10th Cir.1996).

1. Futility

The district court denied Bauchman's motion to amend on the grounds that her proposed amendments were futile. The majority also concludes that Bauchman's proposed amendments are futile,[7] and thus affirms the ***573** district court's denial of

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[7] The majority apparently reaches this conclusion on a significantly different ground than did the district court. The district court concluded that both the effect and purpose prongs of the endorsement test must be viewed objectively and, therefore, "actual" purpose was irrelevant. The majority explicitly rejects the district court's mistaken construction of the endorsement test's purpose prong, holding that Bauchman

Bauchman's proposed amendments. The majority's conclusion that Bauchman's proposed amendments are futile is based, however, on its unduly rigid view of the nature of the endorsement test's purpose prong. Under a proper view of the Establishment Clause, Bauchman's proposed amended complaint, by alleging that Torgerson chose the Choir's repertoire and performance venues with the express purpose of advancing religion, along with her allegations regarding Torgerson's twenty-year pattern of misconduct, states a claim upon which relief can be granted.[8] Accordingly, the district

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can state an Establishment Clause claim by demonstrating that the defendants' " 'actual' purpose is to endorse or disapprove of religion." Majority Op. at 551.

[8] In conducting this futility analysis, it is important to be mindful of the procedural posture of this case. The district court dismissed Bauchman's original complaint under Fed.R.Civ.P. 12(b)(6) because that complaint failed to state a claim. On appeal, this court's analysis of futility must center on whether Bauchman's proposed amendments, as supported by the affidavits attached to her complaint, cure the deficiencies in her original complaint. *See Mountain View Pharmacy v. Abbott Lab.*, 630 F.2d 1383, 1386 (10th Cir.1980). Thus, the real question is whether Bauchman's proposed amendments state a claim upon which relief can be granted. In deciding whether Bauchman's proposed amendments state a claim,

> "We will uphold a dismissal [under Federal Rule of Civil Procedure 12(b)(6)] only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." In performing our review, we accept all well-pleaded allegations as true and construe them in the light most

court abused its discretion in rejecting Bauchman's proposed amendments as futile. *See Reliance Ins. Co. v. Mast Const. Co.*, 84 F.3d 372, 375-76 (10th Cir.1996) (holding that abuse of discretion is established if district court's decision is based on an error of law).

As the majority notes, Bauchman's proposed amended complaint "clearly asserts [Torgerson's] conduct was motivated by a religious purpose" and "contains numerous allegations to support [Bauchman's] claim that [Torgerson] has unconstitutionally promoted his religious beliefs in the classroom for over twenty years." Majority Op. at 559-60. In particular, Bauchman's proposed amended complaint and supporting affidavits allege that "Torgerson engaged for many years, and continues to engage, in the advocacy, promotion, endorsement and proselytizing of his religious beliefs and practices, which included requiring students to attend and participate in events during which religious worship has occurred." The proposed amended complaint further alleges that Torgerson undertook this course of activity for the express purpose of endorsing religion.

In support of her allegation that Torgerson chose the Choir's repertoire and places of performance with the express purpose of endorsing religion, Bauchman alleges a twenty-year pattern of misconduct on the part of Torgerson in the administration of the Choir.[9] This alleged misconduct included,

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favorable to plaintiffs. We note that " '[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim.' "

Maez v. Mountain States Tel. & Tel., 54 F.3d 1488, 1496 (10th Cir.1995) (quotations and citations omitted).

[9] Bauchman's ability to discover evidence of Torgerson's past conduct was seriously hampered by the district court's ruling

among other allegations, the following:[10]

> ***574** In 1977, while employed as director of the A Cappella Choir Class at South High School in Salt Lake City, Torgerson forced the students in his Choir class to attend the offering of prayers and sacraments at LDS worship services a[s]

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which limited discovery to the 1994-95 school year. The district court's order was based on its erroneous conclusion that evidence of "actual" purpose and intent was irrelevant because the endorsement test's purpose prong is viewed from an objective perspective. *See supra* note 7; *see also supra* Section III of this separate opinion (noting that Torgerson's past conduct is relevant and admissible for the purpose of proving Torgerson's motive, intent, and knowledge during the 1994-95 school year).

[10] In reciting the lengthy list of Torgerson's alleged past misdeeds, this separate opinion does not express any opinion on the ultimate admissibility upon a motion for summary judgment or at trial of any of the alleged past misdeeds. Nevertheless, the allegations raise a serious and substantial question about patterns of misconduct which may be admissible under Fed.R.Evid. 404(b) to prove intent, knowledge, and motive. *See supra* Section III of this separate opinion (discussing admissibility of Torgerson's alleged past misconduct for purpose of proving motive, intent, or knowledge). It must be noted, however, that before these alleged misdeeds could be admitted under Rule 404(b), they would be subject to the balancing of probativeness and prejudice set out in Fed.R.Evid. 403, a task that the district court did not undertake in light of its erroneous conclusion that the endorsement test's purpose prong operates as an objective test and its subsequent resolution of the case on the pleadings. *See supra* note 7 (discussing approach taken by district court).

part of the regular, required, graded public school curriculum.

....

During 1980, through his position as the director of the A Cappella Choir Class at South High School, Torgerson used an application form for admission to the Choir Class that inquired as to the applicant's religious affiliation. Torgerson inquired about the applicants religious affiliations in order to limit the Choir Class to members of the Church of Jesus Christ of Latter-Day Saints ("LDS Church") because the Choir Class regularly participated in LDS religious services, which participation included speaking and singing presentations by students. The Choir Class did not participate in the religious services of any other religious organization.

During the 1992-93 school year, when Torgerson was employed as the director of the A Cappella Choir class at West High School, Torgerson required the Choir Class to perform approximately once each month at LDS worship services.

....

During the 1992-93 school year, and in the years following, Torgerson frequently discussed the religious content of the many religious devotional songs he required the West High School Choir Classes to sing and used the religious content of the songs to advocate his own religious beliefs.

During the 1993-94 school year, while employed as the director of the A Cappella Choir Class at West High School, Torgerson

> repeatedly advocated his religion in the Choir Class, frequently stated that he was aware of and disagreed with the United States Supreme Court decisions forbidding the advocacy of religion in public school classes, and frequently stated that he would continue in his advocacy of religion in public school classes even though he knew that doing so violated established law.
>
> During the 1993-94 school year, Torgerson required the West High School Choir Classes to practice the religious song, "Lamb of God." During the practicing of "Lamb of God," Torgerson turned off the lights in the classroom and, to the outrage of several students, instructed the Choir Class to visualize "Jesus dying for our sins."
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> ....
>
> During [a] Pacific Northwest Tour in Salem, Oregon, the West High School Choir Class performed at an LDS "fireside" service, where Torgerson portrayed the Choir Class as an LDS religious choir. At the "fireside", LDS Choir Class members "bore their testimonies" about their personal relationship with Jesus and proclaimed that the LDS Church is the only true religion. The Choir Class performed solely Christian devotional music as part of the LDS worship services.

The proposed amended complaint and attached affidavits further allege that in the year immediately preceding the 1994-95 school year, Torgerson (1) utilized the religious content of the Choir's devotional songs to advocate his own religious beliefs; and (2) had the Choir perform at religious worship services where "LDS Choir Class members 'bore their testimonies' about their personal relationship with Jesus and proclaimed that the

LDS Church is the only true religion." These subsidiary allegations relate directly to Bauchman's allegation that Torgerson chose the Choir's repertoire and performance venues for the prohibited purpose of advancing religion.[11] Under the majority's curious new ***575** rule of constitutional relevance, these past manifestations of purpose are somehow converted into mere irrelevant expressions of motive which fail to state an Establishment Clause civil rights claim. As detailed at length above, this is a particularly thin reed upon which to base a finding of futility.

The allegations that Torgerson chose the Choir's repertoire and performance venues for the specific purpose of advancing religion, along with the detailed supporting allegations, state a claim upon which relief can be granted. *See Jaffree*, 472 U.S. at 56, 105 S.Ct. at 2489-90; *Edwards*, 482 U.S. at 585, 107 S.Ct. at 2578; *Lynch*, 465 U.S. at 690, 104 S.Ct. at 1368 (O'Connor, J., concurring). Accordingly, the district court erred in concluding that Bauchman's proposed

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[11] These subsidiary allegations are particularly significant in light of the fact Torgerson was officially reprimanded in April 1994 for offering a prayer before a Choir performance that took place at a Mormon worship service. At that service, the Choir allegedly performed only religious devotional music and Torgerson allegedly portrayed the Choir Class as an LDS religious choir. Because the Choir's repertoire remained the same and the Choir continued to perform at religious venues during the 1994-95 school year, a reasonable inference may be that Torgerson's pre-1994-95 expressed intent to endorse religion remained, but that his same intent was now merely unexpressed in light of the reprimand.

amendments were futile.[12] *See supra* note 8 (noting that the futility analysis in this case must focus on whether Bauchman's proposed amendments state a claim upon which relief can be granted and noting that 12(b)(6) dismissals are highly disfavored). Unfortunately, the majority compounds the district court's error and makes it the law of the circuit when it affirms the district court's finding of futility.

2. Timeliness

The district court held that Bauchman's failure to amend her complaint prior to a ruling on defendants' motion to dismiss and her failure to allege any "essential" facts not otherwise known prior to the dismissal of her original complaint was an alternate ground for denying Bauchman's motion to amend. Because it concludes that Bauchman's proposed amendments

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[12] As an alternative ground for concluding that Bauchman's proposed amendments were futile, the district court concluded that Bauchman's proposed amended complaint would also be subject to dismissal on summary judgment. Although the majority does not reach the merits of the district court's conclusion, it does note that proposed amendments may be denied as futile on this ground. Majority Op. at 561-62. The district court's conclusion that Bauchman's proposed amendments would not survive summary judgment is seriously flawed. As indicated above, the district court's conclusion was based on the erroneous assumption that the endorsement test's purpose prong is viewed objectively rather than subjectively. *See supra* note 7. Furthermore, because the district court erred in limiting formal discovery to the 1994-95 school year, *see supra* note 9, it did not have an adequate evidentiary picture upon which to resolve the summary judgment question.

are futile, the majority decides not to reach the district court's conclusion that Bauchman's proposed amended complaint was untimely. *See* Majority Op. at 562. Nevertheless, the majority "question[s] the district court's rationale under circumstances where, as here, the court deliberately deferred ruling on [Bauchman's] motion to amend pending the completion of additional, limited discovery related to her newly asserted theory that defendants' conduct was primarily for the purpose of promoting or proselytizing religion." *Id.*

The district court's "question[able]" conclusion that Bauchman's proposed amended complaint was untimely is manifestly unreasonable. *See F.D.I.C. v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir.1994) (defining abuse of discretion as an arbitrary, capricious, whimsical, or manifestly unreasonable judgment). The fact that Bauchman did not allege any new "essential" facts in the amended complaint results from the district court's erroneous ruling which precluded any discovery concerning Torgerson's pre-1994-95 conduct on the theory that such conduct was irrelevant to Bauchman's claim under the endorsement test's purpose prong. As indicated above, however, Torgerson's personal intent and motivation in selecting the Choir's repertoire and performance venues are relevant under the endorsement test's purpose prong and Torgerson's past conduct is relevant and potentially admissible under the Federal Rules of Evidence for the purpose of proving Torgerson's motive, intent, and knowledge during the 1994-95 school year.

Most importantly, there is no indication in the record and no district court findings that the defendants would have been prejudiced by allowing Bauchman to amend her complaint or that the proposed amendments were the product of bad faith or a dilatory motive on the part of Bauchman. *See Davis*, 371 U.S. at 182, 83 S.Ct. at 230 (holding that leave to amend must be "freely given" in the absence of undue delay, bad faith, dilatory motive, or futility). In light of the absence of ***576**

either bad faith, a dilatory motive, or prejudice to the defendants, the district court's decision that Bauchman's proposed amended complaint was untimely is manifestly unreasonable.

V. CONCLUSION

Purposeful, deliberate, and intentional efforts to advance or disapprove religion violate the Establishment Clause. *See Lynch*, 465 U.S. at 687-90, 104 S.Ct. at 1366-68 (O'Connor, J., concurring). Bauchman's original complaint fails to state a claim upon which relief can be granted under this standard. Her original complaint does not contain a claim that Torgerson acted with the purpose of advancing religion and none of the actions alleged in the complaint have the inherent effect of advancing religion. Bauchman's proposed amended complaint, on the other hand, does state a claim upon which relief can be granted. The proposed amended complaint alleges that Torgerson selected the Choir's repertoire and places of performance with the deliberate purpose of advancing religion. Furthermore, Bauchman's amended complaint contains numerous subsidiary allegations which detail at length Torgerson's manifestations of that improper purpose over the previous twenty years. Despite the majority's conclusion to the contrary, the allegations regarding Torgerson's alleged past instances of misconduct are relevant to Bauchman's claim of an improper purpose and are sufficient to state an Establishment Clause civil rights claim.

A proper reading of Supreme Court precedent establishes that the Establishment Clause prohibits public school teachers from utilizing their positions for the deliberate purpose of endorsing or disapproving religion. Bauchman's proposed amended complaint states a claim for relief under this standard. The bare sufficiency of Bauchman's proposed amended complaint does not, however, suggest that Bauchman should prevail on the merits or that she is even necessarily entitled to a

trial on the merits. It means only that she has demonstrated the filing of her proposed amended complaint was not futile, she is entitled to discovery unconfined to the 1994-95 school year, and she should be allowed to proceed to the next appropriate test on the substantive issues under the Establishment Clause, whether that test be a motion for summary judgment or a trial on the merits. In short, the Establishment Clause issue in this case is in need of an adequate record.[13]

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[13] In light of the majority's resolution of this case on the threshold issue that Bauchman's proposed amended complaint fails to state a claim, and in light of this dissent, it is neither necessary nor appropriate for this separate opinion to address the remaining multitude of alternative dispositive issues addressed by the parties on appeal.

Rachel BAUCHMAN, By and Through her parent and guardian Cheryl BAUCHMAN,

Plaintiff,

v.

WEST HIGH SCHOOL; Salt Lake City School District; Richard Torgerson; William Boston; Gene Bonella; Teresa Piele; Dolores Riley; Darline Robles; Dale Manning; and Mary Jo Rasmussen,

Defendants,

Liela Quinones Barela, by and through her father, Luke J. Barela; Luke J. Barela in his own capacity; Tamra M. Badger, by and through her parent and guardian William A. Badger; William A. Badger in his own capacity; Cindy R. Badger; Eric Michael Nielsen, by and through his parent and guardian Greg Nielsen; Greg Nielsen in his own capacity; Jo Rita Nielsen; Heather Pettit, by and through her parent and guardian, Ralph Pettit; Ralph Pettit in his own capacity; Elaine Pettit; Joy M. Warthen, by and through her parent and guardian, Lee Warthen; Alexander B. Warthen, by and through his parent and guardian, Lee Warthen; Lee Warthen in his own capacity; Barbara Warthen; Steven C. Eror, Jr., by and through his parent and guardian, Steven C. Eror; Steven C. Eror in his own capacity; Judy H. Eror; Jane Curtis, by and through her parent and guardian, Marvin R. Curtis, Jr.; Marvin R. Curtis in his own capacity; and Joan C. Curtis,

Defendant Intervenors.

Civ. No. 95-C-506G.

United States District Court, D. Utah, Central Division.

May 30, 1996.

Ross C. Anderson, Nathan B. Wilcox, Anderson & Karrenberg, Salt Lake City, UT, Andrew C. Hruska, Edward A. Harris, Georgina E. Hayden, Michael W. Martin, Sullivan & Cromwell, New York City, for Cheryl Bauchman.

John Robson, James F. Wood, Fabian & Clendenin, Salt Lake

City, UT, Dan R. Larsen, Utah Attorney Generals Office, Salt Lake City, UT, for West High School, Salt Lake City School District, William Boston, Gene Bonella, Teresa Piele, Dolores Riley, Darline Robles, Dale Manning, and Mary Jo Rasmussen.

David J. Jordan, Kenneth B. Black, Stoel Rives Boley Jones & Grey, Salt Lake City, UT, for Richard Torgerson.

James W. McConkie, III, Richard B. McKeown, Parker, McKeown & McConkie, Salt Lake City, UT, Brent D. Ward, Parry Murry & Ward, Salt Lake City, UT, Kevin J. Hasson, Nancy E. Smith, Becket Fund for Religious Liberty, Washington, DC, for Luke J. Barela, William A. Badger, Cindy R. Badger, Greg Nielsen, Jo Rita Nielsen, Ralph Pettit, Elaine Pettit, Lee Warthen, Barbara Warthen, Steven C. Eror, Judy H. Eror, Marvin R. Curtis, Jr., Joan C. Curtis.

MEMORANDUM DECISION AND ORDER DENYING LEAVE TO AMEND

J. THOMAS GREENE, District Judge.

***1** This matter is before the court on plaintiff Rachel Bauchman's Motion to Amend her claim that defendants violated her First Amendment rights concerning establishment of religion.

On November 22, 1995, after consideration of extensive legal memorandums and materials concerning plaintiff's Motion to Alter or Amend Judgment and for Reconsideration of Order Granting Defendants' Motions to Dismiss, this court denied plaintiff's motion for reconsideration as well as her motion to amend, except that the motion to amend as to a new establishment of religion claim was held in abeyance. In that regard, plaintiff proposed an amendment which changed her theory for recovery and alleged additional facts. The new direction taken in the proposed amendment was that the purpose

and actions of choir director Torgerson in the selection, rehearsal and presentation of choir music of a religious nature, rather than the singing of Christian songs in religious venues in and of itself, violated the Establishment Clause.

In spite of lengthy allegations in the proposed new pleading, this court regarded the newly proffered theory as the only material difference between the proposed amended complaint and the pleadings which had been dismissed by the court. The newly asserted claim implicated the secular purpose prong of the Lemon test,[1] in an apparent attempt to overcome this court's ruling under the original pleadings that the musical presentations had a primarily secular purpose.[2]

In order to determine whether leave should be granted to

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[1] Under Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), governmental action (1) must reflect a clearly secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must avoid excessive government entanglement with religion. The so-called "Lemon test" is in an apparent state of flux, particularly as to the secular purpose and primary effect prongs, as is discussed infra at IIA.

[2] In its Memorandum Decision and Order Granting Defendants' Motions to Dismiss, this court said: "In the case at bar, assuming plaintiff's allegations to be true, Torgerson's selection of the musical curriculum, including songs of an explicitly religious character, and the selection of explicitly religious sites for some performances, appears to have a primarily secular purpose--to teach musical appreciation, to broaden the students' understanding of musical culture, and to increase the students' awareness of culture and diversity." Bauchman v. West High School, 900 F.Supp. 254, 268 (D.Utah 1995).

file an amendment "consistent with plaintiff's new theory," this court permitted the conduct of limited discovery on the narrow issue "whether the actions by Torgerson in the selection and rehearsal of Christian songs as part of the music class curriculum, and the performance of such songs by the [Choir] at religious venues, were primarily for a secular purpose or primarily for the purpose of promoting or proselytizing religion."[3] Limitations were imposed in order to focus the impact upon plaintiff and what actually happened during the short period of time she was a member of the West High A'Capella choir.[4]

REVIEW UNDER THE REASONABLE OBSERVER STANDARD

The alleged acts and conduct of Choir Director Torgerson and the other defendants are reviewed and measured under the reasonable observer standard.[5]

Both parties conducted discovery in order to assist the court to determine the necessity or desirability of the proposed amendment under plaintiff's new theory.[6] Deposition transcripts,

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[3] Bauchman v. West High School, Order dated Nov. 22, 1995, at p. 4 and p. 10.

[4] Discovery "shall be limited to the time period during which plaintiff was a member of the A'Cappella choir at West High during the school year 1994-95 until the West High graduation exercises on June 7, 1995, and to matters, songs and occasions in which plaintiff claims that Mr. Torgerson violated her First Amendment rights concerning establishment of religion." Order at p. 11.

[5] See discussion, infra, at IIA.

[6] Fed.R.Civ.P., Rule 16(c)(2).

exhibits and affidavits were submitted in support of their respective positions. Plaintiff's counsel understood that the purpose and scope of the discovery was to develop "facts underlying the defendants' purpose of endorsing religion."[7] It was manifest that the materials would be considered by the court in determination of the motion to amend. Accordingly, such factual materials are taken into consideration in furtherance of an objective review of the acts and conduct of defendants from the standpoint of a reasonable observer.[8]

***2** Following the discovery period set by the court, plaintiff elected to stand on the amended pleading proffered before the conduct of discovery, rather than to present a new proposed amendment.[9]

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[7] Plaintiff's Reply Memorandum in re Renewed Motion to Amend, p. 4.

[8] In exercising its discretion under Rules 16(c)(2) and 15(a) Fed.R.Civ.P. concerning the proposed amendment, the court undertakes to determine whether the acts and conduct in question objectively reviewed could withstand a motion to dismiss under Rule 12(b)(6), or a "speaking" motion to dismiss in the nature of summary judgment under Rule 56 because of the voluminous factual materials which have been presented. Under either standard of review, this court determines to deny the motion to amend pursuant to the futility doctrine and for the other reasons set forth herein.

[9] Counsel for plaintiff asserts that the "deficiency is corrected" in the presently proposed complaint and "the record developed in the latest round of limited discovery." (Plaintiff's Memorandum in Support of Renewed Motion, p. 50.)

I. REARGUMENT OF CLAIMS AND MATTERS PREVIOUSLY RULED UPON

A. Claims Other than Establishment of Religion

With respect to plaintiff's reargument concerning matters other than the issue as to which this court permitted discovery, such matters are not before the court since they were previously argued, ruled upon and rejected in this court's prior rulings on defendants' Motions to Dismiss and plaintiff's Motion for Reconsideration.[10] Accordingly, the attempted re-submission by plaintiff of claims for alleged violation of Free Exercise of Religion, Freedom of Speech, the Religious Freedom Restoration Act, and Utah State Constitutional claims are denied. Other matters previously ruled upon or which do not directly bear upon the identified issue concerning establishment of religion, such as inquiry into actions of Torgerson when plaintiff was not a member of the Choir, also are beyond the scope of the issue here determined.

B. Establishment of Religion Claim Based Upon Religious Music

In plaintiff's establishment of religion claim as reargued, the court is first confronted with what appears to be an attempted resurrection of plaintiff's original theory--that the singing of songs by the choir constituted the giving of prayers, and that the Christian content of the songs and the religious venues at which they were presented in and of themselves amounted to the establishment of religion. Those matters were squarely dealt with and rejected in this court's Memorandum Decision and Order dated September 12, 1995 dismissing the original

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[10] Fns. 2 and 3, supra.

complaints.[11] The Fifth Circuit rendered a similar ruling in the recent case of Doe v. Duncanville Ind. School District, 70 F.3d 402, 406 (5th Cir.1995). In rejecting an Establishment Clause challenge under its analysis of Lemon, the Fifth Circuit held that singing the song "The Lord Bless You and Keep You" and adopting it as a theme song[12] did not constitute the endorsement of religion[13] or excessive government entanglement with

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[11] Bauchman v. West High School, 900 F.Supp. 254 (D.Utah 1995).

[12] In Duncanville, it was alleged that a high school choir's singing the song "The Lord Bless You and Keep You," as its theme song violated the Establishment Clause. The song was not only routinely sung as a part of the choir's repertoire, but it was sometimes sung at the end of the performance of other songs, at the end of class on Fridays, at choral competitions, and on the bus while returning home from performances. Contrary to the extreme position insisted upon in this case, the Duncanville plaintiffs acknowledged that the Establishment Clause does not prohibit school choirs from singing religious songs. It was unsuccessfully argued that " 'The Lord Bless You and Keep You' as the theme song, rather than as simply one song in the repertoire, transforms the permissible practice of singing this song into an endorsement of religion." 70 F.3d at 406, 407.

[13] As to claimed endorsement of religion, the court said:

> [P]articularly in the world of choral music, singing about religion is not the same as endorsing or exercising religion ... 60-75 percent of serious choral music is based on sacred themes or text. Given the domination of religious music in this field, [the Duncanville school officials] can hardly be presumed to be advancing or endorsing religion by allowing its

religion.[14]

Duncanville is consistent with the Eighth Circuit's rejection of an Establishment Clause challenge of the performance of Christmas music and the observance of religious holidays. Florez v. Sioux Falls School District, 619 F.2d 1311 (8th Cir.1980).

Plaintiff continues to argue that the intended singing of the songs "The Lord Bless You and Keep You" and "Friends" at last year's West High graduation exercises should be considered as violative of the Establishment Clause. This court has rejected that contention,[15] but the issue is still reserved for decision by the Tenth Circuit. At this point, however, this court reiterates its opinion and ruling that choir singing of religious music does not automatically equate with praying, and that the selection of Christian songs and the singing of Christian music in religious venues does not per se constitute a violation of the Establishment Clause.

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choirs to sing a religious theme song. 70 F.2d at 408 n. 8.

[14] As to claimed entanglement of religion with government, the court said that singing choral music simply "is not a religious exercise," and declared that "The Lord Bless You and Keep You" as a theme song did not impermissibly entangle government with religion or coerce students into participating in a religious activity .... neutrality towards religion must allow director to recognize the fact that most choral music is religious. 70 F.3d at 407, 408.

[15] Bauchman v. West High School, 900 F.Supp. 248 (D.Utah 1995).

II. ESTABLISHMENT OF RELIGION BASED UPON ACTS AND CONDUCT IN CONNECTION WITH RELIGIOUS MUSIC

A. Secular Purpose is Measured by an Objective Standard of Endorsement of Religion Determined by a Reasonable Observer

***3** The Tenth Circuit has noted that the "secular purpose" as well as the "primary effect" prongs of the Lemon test "have been modified, or at least recast, to ask whether the challenged government action was intended to endorse, or has the effect of endorsing, religion." Robinson v. City of Edmond, 68 F.3d 1226, 1229 (10th Cir.1995).[16] Accordingly, intent to endorse is measured by the objective "reasonable observer" standard in which subjective intent plays no part. In Gaylor v. United States, 74 F.3d 214, 217 (10th Cir.1996),[17] the court emphasized that the inquiry is not whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think

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[16] In City of Edmond, the court dealt with an official City Seal which consisted of four quadrants, one of which contained the Latin or Christian Cross. The court held that the seal violated the Establishment Clause of the First Amendment because the cross constituted a "prominent feature" of the Edmond seal, and the religious significance and meaning of the cross is "unmistakable."

[17] In Gaylor, suit was brought against the United States seeking an injunction against further use of the national motto "In God We Trust" on U.S. currency. The Court of Appeals held that statutes which provide for reproduction on United States currency of the national motto "In God We Trust" do not violate the Establishment Clause.

[the State] endorses religion. Rather, the court reiterated the "reasonable observer" standard. The Gaylor court quoted and relied upon the recent Supreme Court case of Capitol Square Review and Advisory Bd. v. Pinette, --- U.S. ----, 115 S.Ct. 2440 (1995) in which Justice O'Connor of that court said that the reasonable observer standard is an "objective inquiry" that "is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe." 115 S.Ct. at 2455.[18]

Plaintiff's conception of how to determine "secular purpose" and measure whether conduct constitutes endorsement of religion appears to be subjective- oriented, based upon her own conception of what is unlawful or prohibited, rather than the "reasonable observer" standard. Ms. Bauchman regards "any song that mentions deity" as a "prayer."[19] However, she approves certain songs which extoll deity and praying, such as the spiritual

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[18] In Capital Square, the Ku Klux Klan brought action seeking an injunction to require that the Capitol Square Review and Advisory Board issue a permit for erection of a Latin cross in the plaza next to the State Capitol of Ohio in Columbus. The Supreme Court held that the State did not violate the Establishment Clause by permitting a private party to display an unattended cross on the grounds of the State Capitol. In so ruling, the plurality speaking through Justice Scalia said:

> the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship ...

[19] Bauchman Dep. 187:20-23.

"I Wanna Be Ready" and the musical "The Sound of Music."[20] The standard of plaintiff's father, Erich Bauchman, is anything but objective as measured by the "reasonable observer" test.[21] His demands to the Choir Director called for total "exclusion of contemporary religious music, and keeping other religious music to a maximum of 10%."[22] Mr. Bauchman, like his daughter Rachel, challenges choir class rehearsals of religious based music as nothing less than "prayer meetings" because "songs are prayers set to music."[23] The conceptions of both plaintiff and her father flunk the reasonable observer standard.[24]

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[20] Bauchman Dep. 181-184, Black Aff.Exh. 14 at 1.

[21] Mr. Bauchman has advised his daughter, Rachel, in virtually all aspects of the litigation and has acted on her behalf and in effect as her agent in contacts with school officials.

[22] Hruska Aff.Ex. 2.

[23] E. Bauchman Dep. at 65-66.

[24] In Gaylor, the court refused plaintiff's request for further discovery and said:

> [w]e need not engage in such empirical investigation because "we do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion."
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> * * *
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> [T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe.
>
> 74 F.2d at 217 (quoting Capitol Square Review and

B. Acts and Conduct of Choir Director Torgerson from the Standpoint of a Reasonable Observer

The acts and conduct of Choir Director Torgerson must be objectively judged under the "reasonable observer" standard. Thirteen assertions or "claims" are summarized in plaintiff's submissions in support of the proposed amended complaint concerning acts and conduct which allegedly show violation of the Establishment of Religion Clause during the school year 1994-95, when plaintiff was a member of the choir.[25] Some of the highlighted claims are in addition to the specific allegations set forth in the proffered amended complaint.[26] Some of the claims are speculative or conclusory;[27] others are unsupported or at odds with an objective review of evidence developed in discovery.[28]

Advisory Bd. v. Pinette, 115 S.Ct. 2440, 2455 (O'Connor, J., concurring).

[25] The actions primarily relied upon which are claimed to constitute endorsement and promotion of religion by Choir Director Torgerson are summarized in plaintiff's Memorandum in Support of Renewed Motion to Amend at pp. 51-52. These constitute the primary grievances of plaintiff which were developed during the discovery period and are separately referred to in the court's discussion which follows.

[26] The conduct of Torgerson alleged to demonstate unconstitutional intent to endorse and proselytize his religious beliefs are set forth at ¶ 17 of the proposed Amended Complaint, pp. 13-20. Claims 1, 2, 4, 7 & 10 described in plaintiff's memorandum were added as a result of discovery.

[27] Claims 6, 7 & 13.

[28] Claims 3, 5, 7, 8, 9, 13.

*4 Plaintiff does not claim that Torgerson directly taught or proselytized his religious beliefs, criticized the religious beliefs of others, conducted or permitted prayers by or with the Choir, or attempted to influence non Christian students to embrace Christianity. Also, counsel for plaintiff admitted at argument that considered alone each of the matters specified may not constitute the Establishment of Religion. It was argued, however, that under the totality of the circumstances the Establishment Clause was violated.

1. Claim: Torgerson admitted that he had "trouble" with the entire "concept" of the separation of church and state in the public schools.

The basis for this claim is a letter to Choir members and parents from Choir Director Torgerson dated June 6, 1994, the end of the school year preceding the school year when Rachel Bauchman joined the Choir.[29] [FN29] In the letter, Torgerson expresses concern about possible censorship of religious choir music:

Admittedly, I have a little trouble with this separationist concept and I need some time to rethink this entire project. I fear for the day when we will be denied the privilege to sing sacred music, as some have legislated in parts of our country. I also would hope that through understanding and shared experience we can gain a better understanding for one another.

There is no allegation or evidence that Torgerson taught his choir class to disregard the concept of separation of Church and State. The letter does not in and of itself contain any statement which objectively constitutes the establishment of religion.

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[29] Plaintiff's Ex. 12 at p. 5.

2. Claim: Torgerson informed Rachel and her mother that he brings his religion into the Choir Class and that he expects his students to do the same.

Plaintiff's mother, Cheryl Bauchman, testified in her deposition that in the fall of 1994 she approached Mr. Torgerson at a parent-teacher conference and expressed concern "about the number of religious songs they would be performing." According to Mrs. Bauchman, in the course of their discussion Mr. Torgerson said, "I don't believe in leaving my religion at home and ask my students not to do the same."[30]

There is no allegation or evidence that Torgerson taught his choir class to adopt his religion, or that he advocated Christianity or proselyted Mormonism. Even if the disputed statement by Torgerson is deemed to be true, in and of itself, it does not objectively constitute a violation of the Establishment Clause.

3. Claim: Torgerson arranged for the Choir Class to sing at religious services.

This claim was unsupported by evidence produced in discovery.

It was shown that five of eighteen venues (27.8%) were at places owned by churches, but none of the choir singing was done at a religious service. The five off campus performances which were held at sites owned by religious institutions were concerts not in conjunction with religious services. These concerts were given at the Cathedral of the Madeline (Roman

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[30] Plaintiff's Ex. 39 at p. 33.

Catholic), First Presbyterian Church,[31] First Baptist Church and the Assembly Hall and Church Office Building (Church of Jesus Christ of Latter-day Saints). The other thirteen performances were at non religious venues selected for architectural, acoustical, cultural and historical reasons.[32]

***5** The Choir did not restrict its singing concerts to malls, hospitals and nursing homes as demanded by the plaintiff.[33] However, contrary to the asserted "claim," the choir did not sing at any religious service at any place during the school year.

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[31] It is undisputed that the Choir did not participate in any religious service at the First Presbyterian Church, although the choir did perform a concert at the that church. Principal Boston by letter dated April 18, 1995, instructed Torgerson not to arrange for the Choir to participate in religious services at the First Presbyterian Church, which was the apparent understanding of the minister of that Church. Hruska Aff.Ex. 16. Torgerson responded that he "had not participated" in any religious service and that he "had not arranged for a performance." Torgerson Depo. 29:25- 30:3 (Black Aff.Ex. 2). Torgerson never agreed to have the Choir perform at any of the Church's religious services. Id. at 147:23-148:3.

[32] The additional 13 sites at non-religious venues included the University of Utah--Gardner Hall, Ensign Elementary School, Abravanel Hall (twice), Salt Lake Community College, East High School, Rio Grande Depot Historical Museum, Northwest Intermediate School, Bryant Jr. High School, Salt Lake District Choral Festival, West High School, Woods Cross High School, Cyprus High School and Olympus High School. Torgerson Interrogatory Response No. 8 (Black Aff.Ex. 3).

[33] Hruska Aff.Ex. 2.

No reasonable observer would have concluded that the West High A'capella was endorsing religion on account of the venues at which the Choir sang during the 1994-95 school year.

4. Claim: Torgerson selected a majority of religious songs to be performed at non-secular venues for their "Christmas Concerts."

On November 7, 1994, plaintiff's father on her behalf wrote a letter expressing concern about the upcoming "Christmas Concerts" of the Choir. He suggested that the name of the concerts be changed to "Winter Concerts", that the Choir perform only at secular venues and that religious songs be limited to 10% of the repertoire.[34] The requests by Eric Bauchman, after some discussion, ultimately were rejected by school officials. Plaintiff's counsel claims that Rachel was "forced to forego participating" in the Christmas Concerts,[35] but there is no factual support for that conclusory statement. Plaintiff was given the option not to participate in the concerts at no prejudice to her grades, which is what she elected to do.[36] The concerts proceeded as had been scheduled.[37]

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[34] Hruska Aff.Ex. 2

[35] Plaintiff's Memorandum p. 12.

[36] Boston letters dated November 18, 1994 and December 1, 1994. Hruska Aff.Exs. 6, 42.

[37] The West High choir's Christmas concerts presented mostly Christian- oriented songs, including Mary Had a Baby; Ding Dong Merrily on High; Hallelujah Chorus from "The Messiah'; O Come O Come Emmanuel; Angels We Have Heard on High; Silent Night; Good King Kong Looked Out; The Shepards Had an Angel; Advent Gift; and Star of Bethlehem. See (Hruska Aff.Ex. 11). Three of the four concerts were held

This court concludes that the singing of Christmas carols and religious songs at Christmas time--not in conjunction with religious services--does not constitute the establishment of religion from the objective standpoint of a reasonable observer.[38] The West High Christmas concerts during the school year 1994-95 were not without secular purposes or objectives and were not motivated by wholly religious purposes.[39]

5. Claim: Torgerson allowed the concert at the LDS Church Office Building to be opened with a prayer.

This claim was unsupported by evidence developed in discovery.

Plaintiff was not present at the concert on December 7,

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at LDS-affiliated buildings (see Text and Fn. 29, supra.)

[38] This court agrees with her Supreme Court of Utah's analysis concerning the impact of religious singing at Christmas time:

> ... when sung apart from a formalized worship service, on or off church property, carols are simply artistic expressions of a predominantly Christian culture. The same is true of any number of other artistic expressions that have occupied center stage in Western European civilization for more than 1500 years.
> Society of Separationists v. Whitehead, 870 P.2d 916, 932 (Utah 1993).

[39] In Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir.1994) the Seventh Circuit said: "[T]o determine that there is no secular purpose, we must find that the action was 'motivated wholly by religious considerations.' " (Quoting Lynch v. Donnelly, 465 U.S. 668, 680, 104 S.Ct. 1355 (1984).

1994 when the prayer allegedly occurred. Counsel for plaintiff represented to the court that the performance in question "included a prayer over the class, instructing that all students should 'thank the Lord' for the music."[40] The misleading implication is clear that Mr. Torgerson was so instructing the students and presenting the alleged prayer.

The only evidence as to this matter was from a student choir member, Elizabeth Ikeda, who testified by way of deposition that on the occasion in question an unidentified woman "talked about the LDS church beliefs," but that a "prayer" was not offered. Torgerson had nothing to do with the matter and did not arrange or instruct the giving of a prayer by the unidentified woman, or otherwise. The witness could not remember what the woman said.[41]

The unsupported allegation and the backup for it fall far short of matter which would support a constitutional claim of establishment or endorsement of religion.

*6 6. Claim: Torgerson assigned a vast preponderance of religious songs, most of which had little or no aesthetic merit.

This claim is speculative as well as conclusory.

Counsel for plaintiff, in disregard of the Discovery Plan approved by the court, submitted the affidavits of three music experts after the deadline set forth in the Plan (Jan 17th) and after the discovery cut-off date (March 4). These untimely affidavits addressed the alleged high percentage of low quality religious

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[40] Plaintiff's Memorandum, p. 13.

[41] Plaintiff's Ex. 38 at p. 96.

content in the choir's repertoire. It was pointed out by plaintiff's experts that 24 of the 38 songs (63%) "have a religious focus."[42] The objections by plaintiff's experts to the high religious based content of the repertoire is an apparent criticism of all choral music. The very nature of such music is largely religious in nature. In this regard, the Fifth Circuit has recently pointed out that "60-75% of serious choral music is based on sacred themes or text", Doe v. Duncanville Ind. School Dist, 70 F.3d 402, 407 (5th Cir.1995).

Plaintiff's experts regarded the Choir's repertoire as "commercial" in value, "uninspired", lacking "depth of expression" and failing to "speak profoundly to the human spirit." The matter of attempting to "grade" songs for aesthetic merit in a repertoire chosen by a school's music department was addressed and rejected by this court in previous proceedings, and such was beyond the scope of the issue to be decided at this time.[43]

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[42] Yannatos Aff., ¶¶ 1-2; Feldman Aff., ¶ 1; Connell Aff., ¶¶ 1-2.

[43] In dismissing Bauchman's original Complaint, this court ruled that a workable rule of First Amendment law cannot turn on the "quality" of the alleged "religious content" of a choir's repertoire because "[i]t would be impracticable for the courts to determine the constitutionality of songs and grade them as acceptable or unacceptable" because of perceived high or low musical quality. Bauchman v. West High School, 900 F.Supp. 254, 268 n. 18 (D.Utah 1995). On Nov. 22, 1996, in connection with the current proceeding, this court noted that "courts cannot and should not be required to 'grade' the quality or content of musical selections which are included in a school's curriculum, or the degree of Christianity or non Christianity contained therein." Bauchman v. West High School, Civ. No. 95-C-506G.

However, the affidavits are of little assistance in any event. In Duncanville, the song most criticized here--"The Lord Bless You and Keep You"--was regarded as a "good piece of music.[44] This court reiterates its view of the folly of the attempt by plaintiff's outside experts to second guess the judgment of a school's music director in the selection of songs in a repertoire, and to presume to "grade" choir music.

In the opinion of this court, it would not be apparent to the reasonable observer that the choir's repertoire is overly weighted with low quality religious music having the effect of endorsement of religion. Likewise, the choir's repertoire presents to an objective observer no apparent violation of the Establishment of Religion Clause when the songs in the repertoire are not sung at religious or worship services.

7. Claim: Torgerson attempted to conduct a covert spring tour with West High Choir Class students that was intended to feature "expressions of faith and prayer" and that was designed to exclude Rachel and other non-LDS

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[44] "The Lord Bless You and Keep You" demonstrates the futility of asking a court to judge the constitutionality of music by choosing between opposing expert opinions which advocate or disparage the worth of particular musical selections which have been selected by a school's music department. Professor Martha Feldman, plaintiff's expert, in effect opined that the song is of low quality--of "negligible artistic merit" and "tediously repetitive" even though "harmonizations are competent." (Affidavit G in support of plaintiff's motion.) However, it is referred to by the choir director of the Duncanville School District as "particularly useful to teach students to sight read and to sing A'Capella, as well as being "a good piece of music ... by a reputable composer." 70 F.3d at 406.

students.

This claim is unsupported by discovery and the claim is speculative.

Torgerson did not plan or seek school district approval for a school-sponsored choir tour for the year 1994-95, as had been done in prior years.[45] In reaction, students attempted to organize a private spring tour to be sponsored by a Boy Scout Explorer Post that was not affiliated with West High School.[46] Principal Boston heard about the plans and in questioning students was told that "all contacts [for the private tour] were made outside of class time, usually in the hall outside the choral room, student to student."[47] Torgerson agreed with the students that he would be willing to "participate as far as going" on the tour.[48] Torgerson did not organize the tour or participate in any fundraising. He assumed that "everyone who wanted to go would have an opportunity to go."[49] Plaintiff and two other Jewish students were not on the list of students to be invited on the tour.[50] After confrontations with students who were involved in organizing the tour, one of the girls saw a student organizer talking with Torgerson and assumed the they must have been discussing the

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[45] Torgerson Depo. 111:6-19 (Black Aff.Ex. 2).

[46] Catenzaro Depo. 55:20-56:15 (Black aff. Ex. 16).

[47] Boston Depo. 62:4-13 (Black Aff.Ex. 10).

[48] Torgerson Depo. 115:18-21 (Black Aff.Ex. 2).

[49] Torgerson Depo. 115:22-116:1.

[50] Student Choir officer and organizer Catenzaro made up the list of students to be contacted. Catenzaro Depo. 64:25-65:7 (Black Aff.Ex. 16).

matter.[51] No conversation was overheard and later the Jewish girl was given an application to join the tour.

*7 The so-called "covert tour" complained about never happened because it was cancelled.[52]

The objective observer could only speculate about plaintiff's claim that the abortive tour was intended to feature "expressions of faith and prayer." Nothing done by Torgerson in this regard constituted a constitutional violation.

8. Claim: Torgerson lashed out at Rachel in retaliation for her efforts to voice her concerns over his unconstitutional behavior.

This claim was unsupported by evidence produced in discovery.

Bauchman admits that Torgerson never mentioned her by name in any lecture,[53] but believes that Torgerson singled her out by stating that "Jews of all people should be tolerant of Mormons

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[51] Rosenblatt Aff. ¶ 5.

[52] Parents who were concerned about the controversy and unpleasantness of the situation caused the tour to be canceled. Preston Naylor testified that he did not want to see the tour occur and thus "finally prevailed and got the tour canceled." Naylor Depo. 81:6-16 (Black Aff.Ex. 8). He sent a letter to students, canceling the private tour. Id. at 81:24-82:5; Hruska Aff.Ex. 15.

[53] Bauchman Depo. 47:13-18 (Vol. 1); 64:14-19 (3/15/96) (Black Aff.Ex. 4).

because they both were persecuted for their beliefs."[54] On the day Bauchman believes Torgerson lashed out at her, she recorded his statement in the journal she prepared at the suggestion of her attorneys: "He also mentioned how Jews and Mormons were so similar because we both were persecuted for our beliefs."[55] As to the truly reprehensible statements complained about by plaintiff and set forth in several of her papers, it is now clear that plaintiff does not claim such to have been made or condoned by Torgerson.[56]

Even if a reasonable observer were to regard Torgerson's remarks about religious tolerance and persecution as indirectly aimed at plaintiff, such do not rise to the level of a constitutional violation.

9. Claim: Torgerson repeatedly lectured the Choir Class on the centrality of religion in his teaching and his refusal to brook protest, opposition or different opinions.

Bauchman asserts that "Torgerson emphasized songs with lyrics extolling Christ as the Messiah and Savior of the world and repeatedly instructed the students that they were to "feel the music" and "believe the lyrics" they were singing."[57] In support, plaintiff supplies the affidavit of Rebecca Sullivan and the deposition of Elizabeth Ikeda. Sullivan said "Torgerson

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[54] Bauchman Interrogatory Response No. 1 (Hruska Aff.Ex. 1).

[55] Black Aff.Ex. 14 at 4.

[56] Torgerson never called Rachel a "Dirty Jew" or any other racial epithet; nor did he condone any student's attacks on Rachel. Bauchman Depo. 33:13-34:7 (Black Aff.Ex. 4).

[57] Renewed Motion p. 6-7; Bauchman Interrogatories p. 5.

frequently instruct the Choir Class to "feel the music."[58] Ikeda said "Torgerson, in order to create the right effect, would say, try to feel the music, listen to the words, don't just sing it without thinking about the words;"[59] but flatly denied that Torgerson ever told the Choir to "believe the lyrics" or believe the message of the lyrics.[60] In connection with his instruction to the class to "feel the music," Torgerson testified about the song practice of "Ave Maria":

Q. Would you encourage a student who was singing the song "Ave Maria," would you encourage your choir to attempt to feel the music.?

A. Definitely

Q. To have some--put some emotional content into their singing?

A. Yes.

Q. Would you by that instruction intend to encourage the students to actually worship the Virgin Mary?

A. No.[61]

Bauchman claims that on March 14, 1995, Torgerson stated in a classroom lecture that "the Supreme Court was wrong to forbid him from advocating religion in the classroom."[62] But in a journal entry for the same day produced in discovery, there is no reference to the "Supreme Court",[63] and plaintiff admitted in her deposition that on March 14, 1995, the lecture in question,

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[58] (Sullivan Aff. ¶ 3).

[59] (Ikeda Depo 22:1-9).

[60] (Ikeda Depo. 99:11-15).

[61] (Torgerson Depo. 158:19-159:6)

[62] Bauchman Interrogatory Response No. 1 (Hruska Aff.Ex. 1).

[63] Black Aff.Ex. 14 at 2-3.

Torgerson said nothing about the Supreme Court.[64] Further, plaintiff's friend and classmate Liz Ikeda testified that Torgerson "never really directly said that he wanted to advocate religion in class."[65] She further testified as follows concerning Torgerson's lectures[66]:

***8** Q. Can we fairly summarize the content of [Torgerson's] lectures by saying that he talked about his view of his freedom of speech, his view of his academic freedom and his feelings about the controversy that had arisen in the school about the choir?
A. Yes.
Q. These lectures were not about religious doctrine, were they?
A. No.
Q. Mormon doctrine?
A. No.

Torgerson never talked to the Choir about religious doctrines or beliefs.[67] Also, Torgerson never told the Choir he was a Mormon or suggested that Choir members should become Mormons or Christians.[68]

No objective or reasonable observer would regard the aforesaid statements of Torgerson, or his instructions to "feel the music," as rising to the level of a constitutional violation.

10. Claim: Torgerson offered thanks to "the Heavenly Father" at the final Choir performance prior to

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[64] Bauchman Depo. 37:8-10 (3/15/96) (Black Aff.Ex. 4).

[65] Ikeda Depo. 62:21-63:6 (Black Aff.Ex. 5).

[66] Ikeda Depo. 68:13-24 (Black Aff.Ex. 5).

[67] Bauchman Depo. 81:17-25 (Black Aff.Ex. 4).

[68] Bauchman Depo. at 79:6-12.

graduation.

The Choir's year-end concert, not attended by plaintiff, was at the First Baptist Church. According to a friend of plaintiff, at the end of the concert, Torgerson thanked his "heavenly father" for "the opportunity in working with these young people."[69]

The Reverend Ikeda did not consider that Torgerson uttered a "prayer,"[70] and his daughter thought it was simply an "emotional speech ... at the end of the school year"; "I think it's okay, because [Torgerson] did say it was his heavenly father and he didn't--I think, you know, that's his own personal statement, I guess."[71]

It affirmatively appears that Torgerson made no utterance at the final choir performance which reasonably could be considered to be a prayer. In any event, the statement made by Torgerson does not amount to conduct in violation of the Establishment of Religion Clause from the standpoint of a reasonable observer.

11. Claim: Torgerson selected exclusively religious devotional songs to be performed by the Choir Class at the school's Graduation ceremony.

There is nothing new in the assertions and position of plaintiff as to this matter. Two songs which plaintiff has maintained and continues to maintain amount to prohibited

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[69] Ikeda Depo. at 12:4-12; Rev. Ikeda Aff., ¶ 5.

[70] Rev. Ikeda Aff., ¶ 5.

[71] Ikeda Depo. at 12:19-13:1.

graduation prayers,--"The Lord Bless You and Keep You" and "Friends"--were scheduled to be sung at graduation in June 1995 by the West High A'Capella Choir. This court refused to issue a Temporary Restraining Order enjoining the singing,[72] and was overruled by the Tenth Circuit. That matter is still reserved as an issue to be decided on the merits by the Tenth Circuit.

12. Claim: Torgerson assisted in students plans to violate the direct order of the Court of Appeals to refrain from promoting religion at the Graduation.

This matter likewise is not new. It was the subject of an extensive hearing on alleged civil contempt before this court sitting as a Special Master by designation of the Tenth Circuit. A Report and Recommendation with factual findings was submitted to the Tenth Circuit recommending that a determination be made that no violation of the Tenth Circuit's Order had been shown to have occurred by clear and convincing evidence.[73] This was upheld by the Tenth Circuit.[74]

*9 13. Claim: Torgerson vowed never to change his consistent pattern and practice of aggressive advocacy of religion.

This claim was unsupported by evidence developed in

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[72] A memorandum in further explanation of this court's position was later issued. Bauchman v. West High School, 900 F.Supp. 248 (D.Utah 1995).

[73] Report and Recommendation. Bauchman v. West High School, 906 F.Supp. 1483 (D.Utah 1995).

[74] Bauchman v. West High School, 10th Cir.Order No. 95-4084 (February 5, 1996).

discovery. It constitutes an unjustified conclusory statement by legal counsel.

According to Rachel Bauchman, Torgerson stated to the class that he would not change his manner of teaching and that he found it hard to teach music without emphasizing religious music. Rachel's Responses at 5, 21 (Hruska Aff.Exh. 1). Another student in the class reported that Torgerson said to the class that "I'm a religious man. It's just a part of my life that I can't ignore." Rosenblatt Aff. ¶ 3. These statements do not justify counsel's claim of a "vow" or that Torgerson's statements amounted to "aggressive advocacy of religion."

On review of the evidence, it does not appear to this court that individually or in toto the acts and conduct of Choir Director Torgerson amounted to the endorsement of religion from the standpoint of a reasonable objective observer. Accordingly, this court rules that such did not violate the Establishment of Religion Clause.

C. The Futility Doctrine

Leave to amend should not be granted if it is apparent to the court that a proposed amendment would be futile. Foman v. Davis, 321 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir.1983). In Sooner the Tenth Circuit held that the trial court acted within its discretion in refusing further leave to amend where "conclusory allegations" in the second amended complaint failed to cure defects in the first amended complaint.[75]

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[75] See also Dunn v. White, 880 F.2d 1188 (10th Cir.1989) (only well pleaded facts, as distinguished from conclusory allegations, must be assumed as true).

It is the judgment of this court that pursuit of the proposed amended complaint as to alleged establishment of religion by Torgerson should not to be permitted because it would be futile for failure to state a claim. Also, upon objective review of the undisputed materials facts, it would be subject to dismissal under a motion for summary judgment.

D. Untimeliness of the Proposed Amendment

On September 12, 1995, after the filing of substantial legal submissions and the presentation of argument,[76] this court granted defendants' motions to dismiss. Plaintiff had determined not to present any further amendment to its pleadings and had submitted the matter for decision on the basis of the original and supplemental complaints, although the deficiencies underscored by the court in dismissing the complaint were argued at length. A memorandum decision and order was issued in explanation of the court's order of dismissal.[77] Only after this adverse ruling did plaintiff determine to request leave to further amend.

Plaintiff has not provided justification for failure to amend prior to a ruling on defendants' motions. The essential facts upon which the proposed new amendment is based were known prior to the ruling of this court in dismissing plaintiff's original complaints. Accordingly, this court denies plaintiff's untimely motion to amend. See Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir.1994); Barrett v. Tallon, 30 F.3d 1296, 1301 (10th Cir.1994); Castleglen, Inc. v. Resolution Trust

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[76] Prior to argument, plaintiff had proffered a supplemental pleading which the court deemed to be filed for purposes of the pending motions.

[77] Bauchman v. West High School, 900 F.Supp. 254 (D.Utah 1995).

Corp., 984 F.2d 1571, 1585 (10th Cir.1993); Ketchum v. Cruz, 961 F.2d 916, 920-21 (10th Cir.1992); Glenn v. First Nat. Bank in Grand Junction, 868 F.2d 368, 371 (10th Cir.1989); Eames v. City of Logan, Utah, 762 F.2d 83, 85 (10th Cir.1985); Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir.1983).

III. SUPERVISORY LIABILITY OF INDIVIDUAL DEFENDANTS[78] [FN78]

***10** Since this court has concluded that defendant Torgerson did not violate plaintiff's constitutional rights, the proposed amendment concerning claims against the School District defendants likewise should be denied since the claims would be subject to dismissal.

Plaintiff's claims against the School District defendants would be subject to dismissal and should be dismissed for the additional reason that plaintiff's Amended Complaint lacks well-pleaded facts sufficient to impose personal liability upon defendant Torgerson's supervisors. In this regard, plaintiff established no "affirmative link" between the challenged conduct and the acts of supervisors. Neither did plaintiff allege or present specific facts, as distinguished from conclusory allegations, to establish that the individual supervisory school board defendants acted "so reckless or grossly negligent that future misconduct [was] almost inevitable."[79] Meade v. Grubbs, 841 F.2d 1512,

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[78] See also prior order of dismissal concerning no supervisory liability of individual defendants in this case. Bauchman v. West High, 900 F.Supp. at 264.

[79] In Meade, the Tenth Circuit reiterated the familiar rule that a "supervisor is not liable under Section 1983 unless an 'affirmative link' exists" between the constitutional violation and the supervisor's personal participation, his exercise or

1528 (10th Cir.1988).

IV. QUALIFIED IMMUNITY

This court has previously ruled that there was no "clearly established law" during the 1994-95 school year proscribing the singing of religious music as part of a school's curriculum, prohibiting the selection of a high percentage of religious songs for the choral repertoire, or the singing of songs by school choirs at religious sites.[80] In the Tenth Circuit for purposes of qualified immunity, in order for the law to be "clearly established," there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as [the plaintiff] maintains. Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir.1992). Further, where as here the issue of qualified immunity is raised, plaintiff is "held to a heightened standard of pleading. [Plaintiffs] complaint must include 'all the factual allegations necessary to sustain a conclusion that [defendant] violated clearly established law.' " Sawyer v. County of Creek, 908 F.2d 663, 667 (10th Cir.1990).[81]

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control or direction, or his failure to supervise. 841 F.2d at 1527.

[80] See prior order of dismissal applying qualified immunity resulting in no liability for damages of individual defendants in this case. Bachman v. West High, 900 F.Supp. at 264-65.

[81] Plaintiffs argue that the heightened pleading standard was overruled by the Supreme Court in Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993). However, the Court in Leatherman expressly reserved the issue whether federal courts may apply heightened pleading in qualified immunity cases. Accordingly, the Tenth Circuit's heightened

This court has determined in its review of allegations and the acts and conduct of Torgerson developed in discovery that such did not constitute the establishment or endorsement of religion from the standpoint of an objective reasonable observer. A fortiori, as to the other defendants. In any event, there was no clearly established law that any of the claims asserted by plaintiff concerning the conduct of the choir director would constitute a violation of the Establishment Clause. For instance, nothing in the law was established that a choir director could not urge members of an A'Capella choir to "feel the music" and to sing songs with meaningfulness as to the lyrics.[82] The same is so as to each claim as well as all of the claims together. This court concludes that plaintiff's claim for damages as to all defendants under the Establishment Clause is barred by the qualified immunity doctrine.

***11** Based upon the foregoing, it is hereby

ORDERED, that plaintiff's Motion for Leave to File Amended Complaint is Denied.

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pleading standard continues to apply in such cases in this jurisdiction.

[82] See discussion of claim 6, supra.

No. 97-1764

(2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF UNDER RULE 15.8

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6 pp

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PETITIONER'S SUPPLEMENTAL BRIEF UNDER RULE 15.8

Six days after the Petition was submitted in this case, the Court decided *Crawford-El* v. *Britton*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998), which provides an additional reason for granting the petition and summarily reversing the decision below, or at least vacating and remanding for reconsideration in light of this Court's intervening decision.

In *Crawford-El*, the Court held that the courts of appeals may not craft special procedural rules for constitutional claims that require proof of improper purpose. *Id.* at *11-*13. In the instant case, the Tenth Circuit did just that, requiring that allegations of an unlawful religious purpose in Establishment Clause cases had to be supported by express, contemporaneous admissions of religious intent and that historical and circumstantial evidence would not be considered. *Bauchman* v. *West High School*, 132 F.3d 542, 560-61 (10th Cir. 1997) (Rachel Bauchman's Petition for Writ of Certiorari ("Petn.") at A39-A40).

1. The petitioner in *Crawford-El* was a prisoner who alleged that a prison official's supposed misdirection of packages containing his personal belongings was done in retaliation for protected First Amendment activities. The District of Columbia Circuit had announced a new rule that plaintiffs alleging constitutional torts that required proof of an improper purpose had to establish that motive by clear and convincing evidence. *Crawford-El* v. *Britton*, 93 F.3d 813, 815 (D.C. Cir. 1996), *vacated and remanded*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998). This Court rejected that rule, holding that the proper balance between barring valid claims and freeing public officials from the burdens of answering meritless litigation "does not justify a judicial revision of the law to bar claims that depend on proof of an official's motive." 1998 WL 213193, at *10.

2. This Court's holding is squarely applicable to this case. In *Crawford-El*, both the court of appeals and this Court made clear that their holdings applied "to the wide array of different federal law claims for which an official's motive is a necessary element." *Id.* at *7; *see also* 93 F.3d at 823 (finding clear- and-convincing-evidence standard appropriate "for constitutional torts based on improper motive"). This case presents allegations that conduct undertaken with the purpose of promoting religion constituted a violation of the Establishment Clause. Petitioner alleges that her high school music teacher, among other things, scheduled almost entirely Christian-oriented music, instructed the class that a true appreciation of music comes through religious experience, scheduled class performances in Mormon churches and buildings, offered a prayer at a class performance, and criticized petitioner in class for questioning these practices, all with the purpose of promoting and endorsing the Mormon religion. Petn. at 4-5. As the court below recognized, albeit begrudgingly, this conduct would be improper if done for a religious purpose, *Bauchman*, 132 F.3d at 552-53 (Petn. at A20-

A21), and thus this is a claim of a constitutional tort for which an improper purpose is a necessary element.[1]

3. Like the District of Columbia Circuit, the Tenth Circuit in this case imposed an improperly elevated burden of proving intent for this species of constitutional torts. In fact, the Tenth Circuit's requirement that such intent must be established by direct evidence rather than circumstantial or historical evidence, 132 F.3d at 560-61 (Petn. at A39-A40), was precisely the test that the District of Columbia Circuit had earlier adopted and then abandoned in *Crawford-El* in favor of the clear-and-convincing-evidence standard, 1998 WL 213193, at *5 n.5; 93 F.3d at 815, 817-18. This Court rejected both proposed tests. 1998 WL 213193, at *9 (finding no support "for making any change in the nature of the plaintiff's burden of proving a constitutional violation").

The Court held that the most that may be required to survive a prediscovery motion for dismissal or summary judgment is that the plaintiff "'put forward specific, nonconclusory factual allegations' that establish improper motive." *Id.* at *14 (*quoting Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)). The court below *conceded* that the Amended Complaint in this action met that test. *See* 93 F.3d at 559 (Petn. at A37) (Amended Complaint "clearly asserts defendants' conduct was motivated by a religious purpose" and "contains numerous allegations to support Ms. Bauchman's claim that Mr. Torgerson has unconstitutionally promoted his religious beliefs in the classroom for over twenty years").

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[1] Petitioner's Amended Complaint also alleged that Torgerson's conduct had the illegal effect of advancing religion, involving government in religious entanglements, and endorsing religion. Amended Complaint ¶¶ 6, 16-17; Tenth Circuit Appendix 152-53; 157-69. The court of appeals did not separately address these claims, relying on the district court's treatment of them. 93 F.3d at 561 (Petn. at A40-A41). The court's error in this portion of its analysis is raised by the second question presented by the Petition. *See* Petn. at 17.

Conclusion

This Court's decision in *Crawford-El* makes yet clearer that the Tenth Circuit's decision is both important and erroneous. While this case would justify plenary consideration in order to reinforce the central concerns of Establishment Clause jurisprudence, *see* Petn. at 10-11, *Crawford-El* also provides a sound basis on which to summarily reverse the Tenth Circuit's decision. Viewed under the ordinary standards required by *Crawford-El*, the Amended Complaint clearly stated a cause of action under the Establishment Clause and this Court's past decisions making clear that government action undertaken with the purpose of promoting religion is plainly unconstitutional. *See* Petn. at 11 (citing cases). In the event the Court has any doubt as to the proper application of *Crawford-El* to the Amended Complaint in this case — and we submit that there

should not be any — the Court should vacate the Tenth Circuit's decision and remand this matter for reconsideration in light of *Crawford-El*.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT RICHARD TORGERSON

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QUESTIONS PRESENTED

1. Whether a student's Establishment Clause claim of religious purpose against her school teacher may be premised upon alleged conduct involving nonparties during earlier periods of time even though the complaining student has not herself been subjected to any endorsement of religion.

2. Whether, having correctly stated and followed the standards pertaining to motions to dismiss and for leave to amend pleadings, the Tenth Circuit properly affirmed the district court's orders dismissing petitioner's original complaint and denying leave to amend.

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STATEMENT OF THE CASE

From the outset of this action, petitioner Rachel Bauchman ("Bauchman") has contended that a public school choir may not perform songs with religious lyrics and may not sing in venues owned by churches. Citing analogous Fifth and Eighth Circuit rulings, the Tenth Circuit and, before it, the district court exhaustively reviewed and rejected Bauchman's claims. There is unanimity among federal courts on this point. No court — not even Judge Murphy's dissent in this case — has adopted Bauchman's strained reading of the Establishment Clause as it pertains to public school music curricula and performance venues.

After losing her principal claim in the district court, Bauchman belatedly switched legal theories and sought to amend her complaint. Specifically, Bauchman sought refuge in the *Lemon* test's purpose prong by attacking the entirety of choir director Richard Torgerson's ("Torgerson's") twenty year teaching career, spanning a period before Bauchman was born. This, even though Bauchman participated in the a'cappella choir (the "Choir") at West High School for only one year — the 1994-95 school year. She did not attend West High prior to 1994-95, has not attended since, and has long since graduated from high school. She nevertheless merges allegations regarding prior years with events of the 1994-95 school year in hopes that dredging up the past will breathe life into otherwise futile allegations regarding *her year* in the Choir. Bauchman begrudgingly admitted in discovery that, during her year in the Choir, Torgerson:

- Never had the Choir perform during a religious service;
- Never prayed with the Choir;
- Never talked to the Choir about religious doctrines or beliefs;

- Never criticized the beliefs of any religion, atheism, or agnosticism;

- Never told the Choir he was a Mormon; and

- Never suggested that Choir members convert to Mormonism, Christianity, or any other religion.

Given Bauchman's admissions, the Tenth Circuit looked beyond Bauchman's conclusory allegations to well-pled facts and the evidence Bauchman invited the court to consider. The Tenth Circuit construed the pleadings in the light most favorable to Bauchman, and concluded that she had not pled an Establishment Clause violation. The Tenth Circuit correctly rejected Bauchman's attempt to convert allegations about prior years into a purpose prong violation. After all, the Tenth Circuit reasoned, nothing in this Court's purpose prong analysis "condone[s] the use of alleged past violations suffered by nonparties to bootstrap the constitutional claims of a present litigant." *Bauchman v. West High School*, 132 F.3d 542, 560 (10th Cir. 1997).

A. The Original Complaint

Bauchman, then a sophomore member of the Choir, filed this action on May 31, 1995. TCA 1.[1] In her Complaint, Bauchman asserted an Establishment Clause claim that differs from the one she now puts forward. Originally, Bauchman alleged a violation merely because the Choir's musical repertoire contained some songs with religious lyrics that she characterized as "Christian devotional music" and because the Choir performed at "religious sites." TCA 4-6. Bauchman did not, because she could not, allege that the Choir had performed at any religious service during 1994-95. *Id.*

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1. "TCA" refers to Bauchman's Appendix in appeal No. 96-4101 before the United States Court of Appeals for the Tenth Circuit. "TorApp" refers to Torgerson's Supplemental Appendix in that appeal.

Torgerson and the other school district defendants moved to dismiss Bauchman's Complaint. On September 13, 1995, the district court granted these motions to dismiss, assuming Bauchman's allegations to be true but finding that "singing of songs [with religious lyrics] is not an 'explicit religious exercise' " and that "[m]usic has a purpose in education beyond the mere words or notes in conveying a feeling or mood, teaching culture and history, and broadening understanding of art." *Bauchman v. West High School*, 900 F. Supp. 254, 268 (D. Utah 1995).

B. The Amended Complaint — Bauchman Shifts Theories

Following the dismissal of her Complaint, Bauchman filed a motion for reconsideration or, in the alternative, to amend the district court's order to allow leave to file an amended complaint. In an Order dated November 22, 1995, the district court denied Bauchman's motion for reconsideration. TCA 272-77. Regarding the proposed Amended Complaint, the district court noted that Bauchman had "essentially restate[d] the original grievance," but that she had now alleged facts "dating back to 1977" and pled a single theory regarding the 1994-95 year that was "new and different from what was pleaded" in the original Complaint. TCA 269-71. Specifically, Bauchman alleged for the first time that Torgerson acted with an "improper religious purpose" to "promot[e] and endors[e] religious beliefs." TCA 269-71. Given this new theory, but with nothing more than Bauchman's conclusory allegations to support it,[2] the district court afforded Bauchman a discovery period so that the district court could "determine whether an amendment consistent with [Bauchman's] new theory should be allowed." TCA 276.

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2. As to the 1994-95 school year, the Amended Complaint alleges, in conclusory fashion, that the selection of songs and venues demonstrates that Torgerson's intent was religious. TCA 165-66 (Am. Compl. ¶¶ 17.a., 17.c.).

C. The Facts — As Alleged and As Developed Through Discovery

Pursuant to the district court's order, the parties conducted discovery regarding Bauchman's proposed Amended Complaint. Bauchman's petition badly mischaracterizes the evidence that resulted from that discovery. The facts are as follows:

1. Events That Pre-Date Bauchman's Year in the Choir

Bauchman rehearses a litany of allegations dating back to the 1970's, as if to suggest that events from years ago manifested themselves in the 1994-95 school year. Pet. 2-5. They did not, and Bauchman knows it. The parties did not conduct discovery regarding years prior to 1994-95, and Torgerson disputes much of what Bauchman alleges about earlier years. Even so, in both the district court and the Tenth Circuit, Torgerson acknowledged that, for purposes of the pending motions, Bauchman's far-flung allegations may be assumed as true. Torgerson also conceded that, in the 1970s, 80s, and early 90s, his choirs did what virtually every other high school choir in Utah was doing. They sang on occasion at religious services, including Catholic, Jewish, Baptist, Presbyterian, and LDS services. TCA 581.

Critically, however, the Choir has *not* sung in any religious service since the spring of 1994. That spring, before Bauchman ever enrolled at West High, Torgerson wrote a letter to Choir students' parents in which he responded to some parents' complaints. Torgerson "apologize[d] . . . for any discomfort that [he] caused" and indicated he was "grateful to know that [he] need[s] to be much more sensitive to students' needs." TCA 583, 585. Torgerson declared that he "would never again as an agent of the school offer a prayer in [students'] presence or involve them in a worship service of any kind. I fully intend to keep my word." TCA 582-83. These events pre-date Bauchman's

involvement in the Choir, and, as the facts in 1994-95 demonstrate, Torgerson honored his commitment.

2. Events of 1994-95 — Bauchman's Year in the Choir

The petition misrepresents the record regarding 1994-95 — Bauchman's year in the Choir — suggesting inaccurately that allegations contained in Bauchman's Amended Complaint are "at virtually every point, supported by affidavit, documentary, or deposition evidence." Pet. 3 n.1. In truth, many of Bauchman's allegations were unquestionably disproved during discovery. Neither the district court nor the Tenth Circuit was fooled by Bauchman's sleight of hand.

Bauchman admits, for example, that during the 1994-95 school year Torgerson: (1) never had the Choir perform during a religious service; (2) never prayed with the Choir; (3) never talked to the Choir about religious doctrines or beliefs; (4) never criticized any religion, atheism, or agnosticism; and (5) never told the Choir he was a Mormon or suggested that Choir members become Mormons or Christians. TorApp 84-87, 97.

The Choir's repertoire and performance venues for the 1994-95 school year were similarly unremarkable. The Choir's repertoire consisted of a variety of music with both secular and religious lyrics.[3] While one of Bauchman's "experts" estimated that 63%

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3. The Choir's 1994-95 repertoire consisted of the following numbers: The Rhythm of Life, Consecrate the Place and Day, Jabberwocky, All My Trials, The Gondoliers, Let Me Fly, Ave Verum Corpus, The Eyes of All Wait Upon Thee, Ave Maria-Biebel, Nunc Dimittis, Be Thou My Vision, Beatles Medley, We Shall Not Be Moved, Bashana Haba'ah, You Are My Only One, The Last Rose of Summer, Mary Had a Baby, Ding Dong Merrily on High, Hallelujah Chorus from The Messiah, I Wanna Be Ready, O Come O Come Emmanuel, Angels We Have Heard On High, Silent Night, Good King Kong Looked Out, The Last Words of David, Hanerot Halalu, Friends, Due North — I (Mountains), (Cont'd)

of the Choir's songs "have a religious focus," TCA 334, the Fifth Circuit recently observed that "*60-75 percent* of serious choral music is based on sacred themes or text." *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) (emphasis added).

The Choir performed at 18 different sites during the 1994-95 school year, and only 5 of the 18 sites were affiliated with religious organizations.[4] Bauchman concedes that none of the performances was held during a religious worship service.[5] TorApp 97.

Bauchman also unfairly contends that Torgerson "criticized and ridiculed [her] in class lectures for her concerns." In fact, Torgerson

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(Cont'd)

Due North — III (Woodpecker), Medley from Big River, The Shepherds Had an Angel, I Dreamed a Dream, Advent Gift, The Lord Bless You and Keep You, Psalm 150, We Praise Thee, The Star Spangled Banner, Star of Bethlehem, and Love Changes Everything. TorApp 9-10.

4. Those locations are as follows: First Presbyterian Church, University of Utah — Gardner Hall, Assembly Hall at Temple Square, Joseph Smith Memorial Building, Ensign Elementary School, First Baptist Church, Abravanel Hall (twice), Salt Lake Community College, East High School, Rio Grande Depot Historical Museum, Northwest Intermediate School, Bryant Jr. High School, LDS Church Office Building, Salt Lake District Choral Festival, West High School, Woods Cross High School, Cyprus High School, and Olympus High School. TorApp 67-68.

5. Bauchman distorts the record here, as well. She suggests that Torgerson scheduled "many of the class performances in Mormon buildings and churches at which speakers endorsed the Mormon religion." She is referring to a single performance at the LDS Church Office Building, which Bauchman did not attend. Bauchman's friend, who did attend, indicated only that a woman "who worked in the church office building" introduced the Choir and talked about "religion." TorApp 116A, 116I-116J. At this performance, "there were no prayers offered," there was no religious service, and Torgerson said nothing to indicate support of the woman's remarks at the Church Office Building. TorApp 116B.

was responding to a series of demands and threats leveled against him by Bauchman and her parents.[6] Torgerson gave no "lecture" about which Bauchman complains until the Bauchmans attacked his teaching, TorApp 89, and then "went to the media" with the controversy they had created. TorApp 156-57. In any event, Bauchman's friend in the Choir recounted the benign content of Torgerson's lectures:

> Q. Can we fairly summarize the content of [Torgerson's] lectures by saying that he talked about his view of his freedom of speech, his view of his academic freedom and his feelings about the controversy that had arisen in the school about the choir?
>
> A. Yes.
>
> Q. These lectures were not about religious doctrine, were they?
>
> A. No.
>
> Q. Mormon doctrine?
>
> A. No.

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6. In November 1994, Mr. Bauchman wrote to Torgerson, demanding that the Choir's repertoire completely exclude "contemporary religious music, and keep[] other religious music to a maximum of 10%." TCA 588. Regarding an upcoming Christmas Concert, Mr. Bauchman admonished Torgerson: "Put on a Winter Concert. Hold it in a mall, a school, or perhaps a hospital or nursing home." *Id.* According to Mr. Bauchman, Torgerson turned "every 1 ½ hour [Choir] class . . . into a prayer meeting" — not because spoken prayers were ever uttered, but because "songs are prayers set to music." TorApp 136-37. Rachel Bauchman echoed her father's views. According to Rachel, "any song that mentions deity" is "[b]y my definition a prayer." TorApp 104.

TorApp 116H. Bauchman herself confesses that Torgerson never mentioned her by name in any lecture, TorApp 83, 107, and that while she found Torgerson's statements "unprofessional" and "insulting," they did not affect her religious beliefs and were not "inappropriate" in any other way. TorApp 90-91. For his part, Torgerson made clear to the Bauchmans that Rachel — like any student — was welcome to opt out of any Choir rehearsal or performance. Bauchman understood that the choice to participate with the Choir was entirely hers, and she ultimately received an "A" grade in the Choir. TorApp 78.

Torgerson also did not, as Bauchman contends in her petition, "offer a prayer" at a 1994-95 Choir performance. Pet. 4. Bauchman refers to a year-end concert that she did not attend. Bauchman's friend, who did attend, indicated that Torgerson simply addressed parents and other audience members during a year-end speech in which he thanked his "heavenly father" for the "opportunity in working with these young people." TorApp 112; TCA 338. No one who was there adopts Bauchman's distorted view that Torgerson offered a prayer. Bauchman's friend acknowledged that the statement "was obviously part of [Torgerson's] speech" — simply an "emotional speech . . . at the end of the school year." TorApp 112-13.

Bauchman likewise misrepresents the record regarding the so-called "covert Spring trip." Pet. 4. First, despite the misleading implication in the petition, the tour never did occur and actually got no further than the rough planning stages. Second, the tour contemplated was private, not "covert." Torgerson determined that he would not direct a school-sponsored tour and submitted nothing to the school or school district seeking approval for any tour. TorApp 49. If the tour had materialized, it was to have been sponsored by a Boy Scout Explorer Post that was not affiliated with West High School. TorApp 177-78. Third, it was not "Torgerson's tour." Pet. 5. Student Bonnie Catenzaro tried to

organize the private tour; it was she who called interested students and passed out registration forms.[7] TorApp 177. Neither she nor anyone else used school-owned copiers, papers, postage meters, or any other supplies to contact potential tour participants. TorApp 179-80.

D. The District Court Denies Leave to Amend

Following the discovery period which revealed these facts, Bauchman renewed her motion for leave to amend. Curiously, she did not propose a second amended complaint that incorporated the "facts" she claimed to have gathered during discovery. Instead, Bauchman elected to "stand on the amended pleading proffered before the conduct of discovery." *Bauchman v. West High School*, 95-C-506G, 1996 WL 407856 at *1 (A82) (D. Utah May 30, 1996).[8] While Bauchman complains that the district court improperly "weighed the evidence presented," Pet. 6, it was Bauchman who tendered a host of affidavits and deposition excerpts in support of her renewed motion for leave to amend, and invited the district court to consider this "evidence" in conjunction with the proposed Amended Complaint. In fact, as the district court noted, some of Bauchman's claims were never pled in any complaint, but were argued for the first time in Bauchman's motion for leave to amend. 1996 WL 407856 at *3 (A89).

The district court denied Bauchman leave to amend. *Id.* at *11 (A109). In denying leave, the court reviewed Bauchman's

7. Bauchman claims that she and two other Jewish students were not invited on the private tour. If that is true, it is not attributable to Torgerson. As organizer of the tour, Catenzaro made up the list of students she would contact. TorApp 180-81. She never discussed with Torgerson whom she had contacted, and Torgerson assumed that "everyone who wanted to go would have an opportunity to go." TorApp 48-49.

8. Page numbers preceded by the letter "A" refer to pages in the Appendix to Bauchman's Petition for Writ of Certiorari.

allegations in detail — claim-by-claim — from the standpoint of a "reasonable observer" pursuant to the endorsement test enunciated in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). *Id.* at *3-*9 (A86-A105). The district court assumed well-pled allegations of fact as true and resolved disputed issues of fact in Bauchman's favor. *Id.* at *4-*6 (A90-A99). In other instances, the district court correctly declined to assume as true Bauchman's unpled arguments, where all of the evidence was contrary to her contentions. *Id.* Having applied appropriate standards of review, the district court concluded that Bauchman's proposed amendment was "futile for failure to state a claim." *Id.* at *9 (A106).

E. The Tenth Circuit Affirms the District Court

Bauchman appealed the district court's rulings, and a Tenth Circuit majority panel rejected Bauchman's appeal on a variety of grounds. 132 F.3d 542 (A1-A43). First, the panel noted that Bauchman "declined an invitation to audition" for the Choir after 1994-95 and that she graduated from high school in June 1997. *Id.* at 546 (A7). As a result, the court found, "there can be no reasonable expectation" that Bauchman will again be subjected to any alleged unconstitutional conduct at West High School. *Id.* at 548 (A11). The Tenth Circuit deemed Bauchman's claims for injunctive and declaratory relief moot and dismissed them.[9]

Having narrowed its focus to Bauchman's First Amendment claims under § 1983, the court undertook an exhaustive review of Bauchman's contentions, taking "particular care in studying Ms. Bauchman's claims and legal arguments."[10] *Id.* at 545 (A5). With

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9. The Tenth Circuit also remanded Bauchman's state law claims with instructions to the district court to dismiss the claims without prejudice for want of pendent jurisdiction. *Id.* at 549-550 (A13-A15).

10. The Tenth Circuit dismissed Bauchman's claims under the Free Exercise and Free Speech clauses because Bauchman was unable to plead the requisite (Cont'd)

respect to Bauchman's Establishment Clause claim, the Tenth Circuit reviewed this Court's recent Establishment Clause cases and recognized that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is still the "benchmark case for Establishment Clause analysis." *Id.* at 551 (A17). The court nevertheless heeded this Court's instruction that no " 'single test or criterion' " currently governs analysis under the Establishment Clause. *Id.* at 550 (A17) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984)). Like the district court, the Tenth Circuit applied the purpose and effect components of the endorsement test that has developed in recent years, as well as the entanglement prong found in *Lemon*. *Id.* at 550-56 (A16-A30).

The Tenth Circuit first applied the endorsement framework to Bauchman's original Complaint, reviewing the district court's ruling de novo. The Tenth Circuit recognized its obligation to "accept all the well-pleaded facts of the complaint as true and construe them in the light most favorable to the plaintiff." *Id.* at 550 (A16) (citations omitted). Having done so, the court affirmed the district court's dismissal of Bauchman's Complaint. Citing recent Fifth Circuit authority, the Tenth Circuit observed that

> [a]ny choral curriculum designed to expose students to the full array of vocal music culture . . . can be expected to reflect a significant number of religious songs.

Id. at 554 (A25-A26) (citing *Duncanville*, 70 F.3d at 407-08). Accordingly, the court reasoned,

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(Cont'd)

"element of coercion." *Id.* at 557 (A32). Specifically, Torgerson gave Bauchman the option not to participate in Choir rehearsals and performances and assured that her grade in the Choir class would not suffer if she limited her participation. *Id.* Bauchman does not seek this Court's review of these dismissed claims.

> the selection of religious songs from a body of choral music predominated by songs with religious themes and text, and the selection of public performance venues affiliated with religious institutions, without more, amount to religiously neutral educational choices.

Id. at 556 (A29).

In dissent, Judge Murphy likewise concluded that "no reasonable person" could surmise that inclusion of religious songs in the Choir's repertoire and performances at religious venues had the effect of endorsing religion. *Id.* at 572 (A65-A66). In other words, the Tenth Circuit panel unanimously rejected the fundamental proposition underlying Bauchman's pleadings — that public school choirs may not constitutionally perform religious songs and may not perform, on occasion, at sites affiliated with religious institutions.[11] *Id.* at 553-56, 572 (A23-A30, A65-A66).

The Tenth Circuit majority affirmed the district court's denial of leave to amend. *Id.* at 562 (A42). The Tenth Circuit reviewed the denial of leave to amend for "abuse of discretion," focusing its review on the new allegation in Bauchman's proposed Amended Complaint that Torgerson was motivated by a religious purpose. *Id.* at 559-62 (A36-A42). The court deemed "disingenuous" Bauchman's argument that the district court improperly weighed evidence inasmuch as "[Bauchman] herself participated in discovery and presented supporting materials for the court's consideration." *Id.* at 562 (A42). The Tenth Circuit concluded that Bauchman's allegations do not establish that, during the 1994-95 school year,

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11. In its entanglement analysis, the Tenth Circuit relied, in part, upon *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) — one of the very cases Bauchman holds out as conflicting with the Tenth Circuit's ruling in this case. 132 F.3d at 556 (A28).

> Torgerson actually taught or proselytized his religious beliefs, advocated Christianity in general, condemned or criticized others' beliefs, [or] conducted or permitted prayer or other religious exercises by or with Choir members.

Id. at 561 (A41) (footnote omitted). As a result, "Bauchman's allegations concerning [ ] Torgerson's past conduct provide no . . . indication of a religious purpose during the 1994-95 school year." *Id.* at 561 (A40).

The Tenth Circuit did not, as Bauchman argues, require a "contemporaneous, express admission of an unconstitutional purpose" or require a statement such as, "my purpose is to promote religion." Pet. 7, 11. Rather, having encountered no actionable conduct by Torgerson during the 1994-95 school year, the Tenth Circuit simply ruled that a purpose prong violation must be premised on *some* "objectively discernible conduct or communication that is temporally connected to the challenged activity." 132 F.3d at 560 (A38). In other words, since Bauchman stated no claim of endorsement during her own year in the Choir, the Tenth Circuit rejected her attempt to erect a purpose prong violation solely out of allegations regarding years prior to her enrollment at West High School. The Tenth Circuit found nothing in Justice O'Connor's endorsement analysis that would "condone the use of alleged past violations suffered by nonparties to bootstrap the constitutional claims of a present litigant." *Id.* at 560 (A38). Any other result, the Tenth Circuit reasoned, would: (1) involve courts in the virtually impossible task of attempting to "discern a defendant's psychological *motives vis a vis* his past conduct;" (2) lead to "protracted litigation" by a "single, 'offended' student" who could easily allege religious purposes based upon events from years past; and (3) enmesh the courts in curriculum and educational policy decisions better left to "states and locally elected school boards." *Id.* at 560-61 (A39-A40).

Having held that Bauchman's Complaint and proposed Amended Complaint failed to state a claim, the Tenth Circuit declined to review the district court's ruling that Torgerson and the school district defendants were entitled to qualified immunity. *Id.* at 550 (A15).

REASONS FOR DENYING THE WRIT

This Court's review of Bauchman's claims is unwarranted for several reasons. First, the Tenth Circuit's holding is a sound and unremarkable application of this Court's existing Establishment Clause precedent. It neither departs from this Court's case law nor offers a meaningful opportunity to break new Establishment Clause ground. Second, the "Circuit split" asserted by Bauchman is manufactured, not real. The Tenth Circuit's ruling in this case is readily distinguishable from three of the four rulings Bauchman holds out as conflicting. The fourth ruling, the Eighth Circuit's *Florey* decision, affirmatively supports the Tenth Circuit's ruling and was relied upon by the Tenth Circuit in reaching its decision. Third, the Tenth Circuit recited and properly applied long-recognized pleading standards in affirming the district court's rulings. It imposed no new or improper obstacles to pleading Establishment Clause cases. Fourth, even if there were grounds for this Court's review, Torgerson and the other defendants are entitled to qualified immunity — a separate ground for dismissal of Bauchman's § 1983 claims that obviates any need for detailed review on the merits.

I.

The Tenth Circuit's Ruling is Premised Upon a Sound Application of Existing Establishment Clause Precedent

The Tenth Circuit correctly applied this Court's precedent regarding Establishment Clause purpose analysis. The Tenth Circuit noted that, while "a failure to satisfy the purpose

component of the endorsement test alone" is enough to invalidate government action, this "Court rarely has decided cases based solely on [*Lemon*'s] purpose component." *Id.* at 552 (A19-A20) (citing *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) and *Wallace v. Jaffree*, 472 U.S. 71, 75 (1985) (O'Connor, J., concurring)). When the Court has invalidated government action under a purpose analysis, "the overriding religious purpose of the government action has been obvious, leaving little need to elaborate on the appropriate scope of the purpose inquiry." *Id.* (A20) (citations omitted). The Tenth Circuit applied both the purpose and effect components of the endorsement test to Bauchman's claims. *Id.* (A20-21).

Bauchman misreads the Tenth Circuit's decision and then conjures up a "parade of horribles" that will flow from it. In the end, however, Bauchman cannot escape her own critical admissions that shaped the Tenth Circuit's analysis. Unlike the prototypical Establishment Clause plaintiff, Bauchman sought relief under the endorsement test's purpose component when she herself had not been subjected to any conduct that had the effect of endorsing religion. *See* 132 F.3d at 561 (A41). During *her year* in the Choir, Torgerson never had the Choir perform during a religious service; never prayed in front of the Choir; never talked to the Choir about religious doctrines or beliefs; and never criticized the beliefs of any religion, atheism, or agnosticism. Like any other school choir member, she was given both religious and secular songs to rehearse and perform, and she was asked to perform them, on occasion, at sites owned by religious organizations. No court that has considered these issues has found any constitutional violation. *See, e.g.*, 132 F.3d at 553-56 (A23-A29); *Duncanville*, 70 F.3d at 407-08.

Bauchman also reads far too much into the Tenth Circuit's ruling. The court did not, as Bauchman contends, "nullify purpose analysis entirely by imposing unprecedented obstacles" or bar

"all indirect evidence of intent and motive." Pet. 11. To the contrary, the Tenth Circuit's ruling contemplates that purpose component claims may be supported by "concrete manifestations of intent" — that is, allegations of conduct or statements that are "temporally connected to the challenged activity."[12] 132 F.3d at 560-61 (A39-40). If, during 1994-95, Torgerson had touted his own religion, lectured about Mormon doctrine, or suggested that his students subscribe to Christianity generally, such conduct would have manifested a purpose to endorse religion. The absence of any such allegation regarding Bauchman's year in the Choir brings into striking relief the fact that Bauchman was not exposed to any manifestation of religious purpose.

Moreover, contrary to the argument in Bauchman's supplemental brief, the Tenth Circuit's ruling is not at odds with this Court's recent opinion in *Crawford-El v. Britton*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998). In *Crawford-El*, the Court invalidated the D.C. Circuit's adoption of a "clear and convincing evidence" standard of proof for unconstitutional motive cases. *Id.* at *11-*15. The Tenth Circuit, on the other hand, made no effort to alter the burden of proof in Establishment Clause cases. The court merely applied ordinary pleading standards — not evidentiary burdens of proof — in rejecting Bauchman's allegations. 132 F.3d at 550 (A15-16). The Tenth Circuit indicated only that it was unwilling to try to read Torgerson's mind during the 1994-95 school year, thereby inferring

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12. Nor did the Tenth Circuit engage, as Bauchman argues, in a "plain misreading" of *Board of Education v. Mergens*, 496 U.S. 226 (1990). The majority panel did not mistake *Mergens* as being about something other than the interpretation of legislative purpose. The majority simply cites *Mergens* in passing for the proposition that, under Establishment Clause analysis, "actual" religious purpose may be distinguished from "possible religious motives." 132 F.3d at 560 (A39). In the context of this case, the Tenth Circuit did not confuse Torgerson's supposed religious motives based on allegations dating back twenty years with the fact that Torgerson manifested no religious purpose during Bauchman's year in the Choir.

unconstitutional purposes solely from allegations that predated Bauchman's participation in the Choir by two decades. This Court, after all, has counseled reluctance in attributing unconstitutional purposes to government conduct. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 394 (1983). The Tenth Circuit thus properly refused to "psychoanalyze" Torgerson or divine his "unexpressed or psychological motive" based on events from years before. 132 F.3d at 561 (A40). Indeed, the Tenth Circuit required nothing more of Bauchman than *Crawford-El* suggests: " '*specific*, *nonconclusory* allegations' " that demonstrate Torgerson's purported religious purposes during Bauchman's year in the Choir. 1998 WL 213193 at *14 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991)). In light of what Bauchman admits did *not* occur during 1994-95, it is neither surprising nor inconsistent with *Crawford-El* that the Tenth Circuit found no actionable allegations of purpose in Bauchman's pleadings.

II.

There is No Conflict Among the Circuits

Bauchman goes to considerable lengths to manufacture a split among the courts of appeals. She finds a conflict where none exists. In fact, the rulings in *Black Horse*, *Ingebretsen*, *Jager*, and *Florey* are either readily distinguishable from — or supportive of — the Tenth Circuit's ruling in this case. Bauchman ignores several obvious distinctions.

First, only one of the cases Bauchman cites treated the performance of religious music in public schools, and that case is clearly consistent with the Tenth Circuit's decision in this case. *See Florey*, 619 F.2d at 1317 n.5 (recognizing the centuries-old tradition of singing Christmas carols and holding that "carols have achieved a cultural significance that justifies their being sung in the public schools. . . ."). The Tenth Circuit relied upon *Florey*

in reaching its holding regarding the Choir's curriculum.[13] 132 F.3d at 554, 556 (A24, A28). The other three cases Bauchman cites are school prayer cases, inapposite factually to this case. *See American Civil Liberties Union v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*) (invalidating a school board policy providing for student vote on the question of prayer at high school graduation); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (striking down a state statute permitting student-initiate prayer); *Jager v. Douglas Co. Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (invalidating practice of allowing pregame invocations at school football games). In each of these cases, the school district actually sought to sponsor prayer during the complaining party's year at the school. Here, of course, Bauchman admits that Torgerson did not pray with the Choir, talk about religion, or criticize religious beliefs during 1994-95.

Second, while Bauchman urges a radical distinction between cases involving "the inapposite legislative context" and those invoiving a "flesh-and-blood government actor," Pet. 13, the cases Bauchman cites do not satisfy her own distinction. All four cases examined a state statute or school board policy or practice. As a result, all four courts focused on the objectively discernible purpose of the statute or policy, and none of the courts engaged in anything resembling the approach Bauchman urges — an exhaustive, psychoanalytic inquiry into a single government actor's alleged conduct and unexpressed motives dating back twenty years. *See Black Horse Pike*, 84 F.3d at 1484-85; *Ingebretsen*, 88 F.3d at 279; *Jager*, 862 F.2d at 829-30; *Florey*, 619 F.2d at 1314-15. Moreover, nothing in these cases indicates that the Third, Fifth, Eighth, or Eleventh Circuits would be any more inclined

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13. Bauchman also suggests a split between the Fifth and Tenth Circuits. Yet the Tenth Circuit cited prominently the Fifth Circuit's recent pronouncement regarding religious music in public high schools. 132 F.3d at 554 (A25); *see Duncanville*, 70 F.3d at 408 n.8 ("[P]articularly in the world of choral music, singing about religion is not the same as endorsing or exercising religion.").

than the Tenth Circuit to attribute unconstitutional purposes to a school teacher when the complaining student concedes that the teacher did nothing to endorse religion during the student's year in the classroom.

Third, Bauchman argues that her claims are viable solely on the basis of a purpose component analysis. Yet none of the cases from the Third, Fifth, and Eleventh Circuits struck down the school prayer statute or policy solely on the basis of the purpose component.[14] *See Black Horse Pike*, 84 F.3d at 1484-88 (school board policy violates purpose *and* effect components; declining to reach entanglement prong); *Ingebretsen*, 88 F.3d at 279 (statute violates purpose, effect, *and* entanglement prongs); *Jager*, 862 F.2d at 829-30 (school policy violates purpose *and* effect components). There is no conflict among the courts of appeals.

III.

The Tenth Circuit Properly Applied Ordinary Pleading Standards

The Tenth Circuit followed this Court's well-settled rules regarding pleadings. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Tenth Circuit recognized that it "must accept all the well-pleaded facts of the complaint as true and must construe them in the light most favorable to the plaintiff." 132 F.3d at 550 (A16). The Tenth Circuit measured Bauchman's proposed Amended Complaint against this same standard, recognizing that a motion for leave to amend a complaint should be denied if the proposed amendment is futile. *Id.* at 559 (A36) (citing *Foman v. Davis*, 321 U.S. 178, 182 (1962)).

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14. Of course, *Florey* — the only case dealing with religious music in public schools — upheld the school district policy as measured against all three prongs. 619 F.2d at 1314-18.

The Tenth Circuit did not, as Bauchman contends, improperly incorporate the district court's "inappropriate weighing of the evidence and rejection of allegations." Pet. 17. The district court fairly construed both Bauchman's allegations and the evidentiary record Bauchman submitted. With respect to well-pleaded allegations of fact, the district court assumed them as true and resolved disputed issues of fact in Bauchman's favor. *See* 1996 WL 407856 at *4-*6 (A90-A99); 900 F. Supp. at 259-61. In a few instances, after the parties had conducted discovery, the district court correctly declined to assume as true Bauchman's unpled arguments, where *all* of the evidence was contrary to her contentions.[15] Bauchman chose, after all, not to propose a second amended pleading after conducting discovery, but to submit evidence for the district court's consideration. 132 F.3d at 562 (A42). Once Bauchman submitted her evidence, she surely could not expect the court to accept as true those allegations as to which all of the evidence was contrary. Both the district court and Tenth Circuit applied appropriate pleading standards in ruling upon Bauchman's allegations.

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15. For example, the district court rejected Bauchman's contention that Torgerson allowed a 1994 concert "to be opened with a prayer" because there was no evidence that it happened, and there was direct, eyewitness testimony that it did not. 1996 WL 407856 at *5 (A94-A95); TorApp i 16A-116J. The district court also was unwilling to assume as true Bauchman's conclusory allegation that Torgerson lectured about "the centrality of religion in his teaching" when Bauchman herself admitted that Torgerson never once spoke to the Choir about any religious doctrine, much less his own religion. *Id.* at *7-*8 (A100-A102).

IV.

Torgerson and the Other Defendants are Entitled to Qualified Immunity — An Independent Ground for the Dismissal of Bauchman's Claims

In dismissing Bauchman's Complaint, the district court correctly observed that Torgerson is entitled to qualified immunity " 'insofar as his conduct *does not violate clearly established statutory or constitutional rights* of which a reasonable person would have known.' " 900 F. Supp. at 265 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981)) (emphasis added). The Tenth Circuit ruled on the merits of Bauchman's pleadings, deeming it unnecessary to reach the district court's qualified immunity ruling. 132 F.3d at 550 (A15). However, the Tenth Circuit dismissed Bauchman's injunctive and declaratory relief claims for mootness, leaving only her § 1983 claims for review. *Id.* at 548-49 (A11-A12). As a result, even if this Court were inclined to review the merits of Bauchman's remaining claims under § 1983, Torgerson's qualified immunity defense would render the claims subject to dismissal.

Since Torgerson has raised the qualified immunity defense, Bauchman must state factual allegations necessary to sustain a conclusion that Torgerson's "conduct violated clearly established law." *Crawford-El*, 1998 WL 213193 at *14. In the Tenth Circuit, for federal constitutional law to be "clearly established," "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as [Bauchman] maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

Bauchman cites no case to "demonstrate that First Amendment law concerning school curriculum or religious music was clearly established during the 1994-95 school year." 900 F. Supp. at 265. Indeed, the virtually unanimous authority from other

jurisdictions was — and continues to be — to the effect that Torgerson's actions during 1994-95 were constitutionally sound. *See, e.g., Duncanville*, 70 F.3d at 404-08 (upholding against an Establishment Clause challenge a high school choir's adoption of the "The Lord Bless You and Keep You" as the choir's theme song); *Florey*, 619 F.2d at 1317 n.5 (noting the "cultural significance" of Christmas carols and holding that they may be sung in public schools); *Chaudhuri v. Tennessee*, 886 F. Supp. 1374, 1388 (M.D. Tenn. 1995) (upholding against an Establishment Clause challenge the singing of religious songs at college graduation); *cf. Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 932 (Utah 1993) ("[W]hen sung apart from a formalized worship service, on or off church property, [Christmas] carols are simply artistic expression of a predominantly Christian culture. The same is true of any number of other artistic expressions that have occupied center stage in Western European civilization for more than 1500 years.") Bauchman's § 1983 claims are subject to dismissal based on Torgerson's qualified immunity.

CONCLUSION

For the foregoing reasons, Torgerson respectfully submits that Bauchman's petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,
Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,
Respondents.

BRIEF OF RESPONDENT-INTERVENORS LEILA QUINONES BARELA, *ET AL.*, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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RACHEL BAUCHMAN,
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WEST HIGH SCHOOL, *et al.*,
Respondents.

BRIEF OF RESPONDENT-INTERVENORS LEILA QUINONES BARELA, *ET AL.*, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondents Leila Quinones Barela, *et al.*, defendant-intervenors below, in opposition to the petition for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

Petitioner omits several critical facts from her Statement of the Case. First, petitioner fails to note that the Court of Appeals found most of this case to be moot. Defendant-Intervenors filed a Suggestion of Mootness with the Court of Appeals on June 20, 1997, bringing to the Court's attention that petitioner—the only plaintiff in the case—had transferred to a private high

school, Rowland Hall-St. Mark's, for the 1996-1997 school year and had graduated on June 7, 1997. In response, the Court of Appeals held that petitioner's graduation mooted her claims for declaratory and injunctive relief. (A10-12.) Thus, all that is left of this case is petitioner's claim for monetary damages—as to which petitioner omits three alternative grounds for affirmance.

First, the district court found that all of the individual defendants were protected by the doctrine of qualified immunity. (A108-109.) *See also Bauchman v. West High School*, 900 F. Supp. 248, 264-65 (D. Utah 1995)—which petitioner has omitted from her Appendix. Second, it found Mr. Torgerson's supervisors protected by the Tenth Circuit's doctrine of Supervisory Liability, because petitioner had not adequately pled an "affirmative link" between Mr. Torgerson's alleged conduct and acts or gross negligence of his superiors. (A107-108); *Bauchman*, 900 F. Supp. at 264. Third, the district court found the high school (and, apparently, the school district) protected under *Monell v. Department of Social Services*, 436 U.S. 658 (1977). *Bauchman*, 900 F. Supp. at 263-64.[1]

All of these arguments for affirmance were presented to the Court of Appeals. Brief of District Appellees at 36-45. *Cf.* A77 n.13 (Murphy, J., dissenting) (" it is neither necessary nor appropriate for this separate opinion to address the remaining multitude of alternative dispositive issues addressed by the parties on appeal."). They are important because, taken together, they would dispose of this entire case, the prospective

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[1]Despite captioning this case "*Bauchman v. West High School*," petitioner did not appeal the district court's dismissal of her claims against the high school itself, but only the dismissal of her claims against the school district and the individual defendants. A10 n.5.

claims as well as the damage claims, against all defendants.[2]

Finally, petitioner also omits mention of respondent-interveners' arguments below. Respondent-intervenors are members of the West High School *a capella* choir and their parents. They intervened in the district court in order to defend their interests in learning and performing a rich and varied repertoire. Respondent-Intervenors believe that the unsurprising presence of sacred music among the selections in the repertoire does not offend the Establishment Clause; indeed, we have argued throughout the proceedings below (and will argue here if plenary review is granted) that the Establishment and Free Speech Clauses forbid the systematic exclusion of music with religious themes or texts that petitioner seeks. *See, e.g.*, Appellate Brief of Defendant-Intervenors-Appellees at 23-32.

REASONS FOR DENYING THE PETITION

The petition is not all that it seems. The first question presented makes it appear as if the Court of Appeals had held that a plaintiff in an Establishment Clause case "must allege an express and contemporaneous admission by a state actor that the challenged conduct was intended as an endorsement of religion." Pet. at (i). That is not the case. The second question presented makes it seem as if the Court of Appeals had dismissed the plaintiffs's amended complaint without construing it "in the light most favorable" to her. *Ibid.* That, too, is not the case. Moreover, as noted above, petitioner fails to inform the Court that her claims for prospective relief are now moot, and that her

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[2]The district court likewise would have denied petitioner's motion for leave to amend based on timeliness. *See* A42-43; A106-107.

damage claims are subject to other defenses. In short, as the Court of Appeals noted in another context, petitioner's argument "seems disingenuous." (A42.)

What is more, at the end of this long, twisted road lies a morass—judicial monitoring of the curriculum choices of public schoolteachers. Petitioner invites the Court in but offers little suggestion of how the Court should find its way through.

Respondents, who are choir members and their parents, are particularly alarmed at the prospect that their ability to interpret the full choral canon may be severely limited by judicial management of their choir's curricular and artistic decisions. Trying to sort out art and obscenity has proven difficult enough. *Compare A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), *with Miller v. California*, 413 U.S. 15 (1973). Respondents shudder to think of the task of sorting out art and religion.

I. The Procedural Posture of the Petition is More Complex Than Petitioner Acknowledges

A. The District Court Did Not Dismiss Petitioner's Complaint "At the Pleading Stage"

The petition makes it sound as if the District Court had improperly dismissed petitioner's amended complaint. *See* Pet. at 17 ("Because a court is not permitted to dismiss a complaint simply because it does not believe the plaintiff's allegations . . . the Tenth Circuit erred in upholding the district court's failure to construe Rachel's allegations in her favor."). That is not what happened. Rather, the District Court dismissed petitioner's original complaint, which alleged in essence that the choir was singing some religious music and performing in some

religious venues, that petitioner had been given the option (in accordance with *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and Utah law)[3] of not participating in matters that violated her conscience and still receiving an "A" for the course, and that petitioner suffered ridicule when she chose not to opt out but instead to demand a change in the curriculum.[4] *See* 10th Circuit Appendix at 4-10.

Following the dismissal of her original complaint, petitioner proffered a proposed amended complaint, together with a motion for leave to file it. The proposed amended complaint added largely conclusory allegations about defendants' purpose and numerous factual allegations about prior years, before Ms. Bauchman was a student in the class, or in the high school itself, or in at least one case, had even been born. *See* 10th Circuit Appendix at 150-205; 158.

The district court postponed consideration of the motion for leave to amend until after discovery could be taken into whether Ms. Bauchman had herself suffered any injury of constitutional dimension. Taking discovery on the question of futility of amendment is not a novel procedure in the Tenth Circuit. *See, e.g., Gilles v. United States*, 906 F.2d 1386, 1391 (10th Cir. 1990) (*en banc*) (remanding for reconsideration of motion for leave to amend "after discovery develops the facts and when the possibility of a claim . . . may be evaluated").

Moreover, in this particular case the district court was amply

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[3]*See* UTAH CODE ANN. § 53-A-13-101.2; UTAH ADMIN. CODE R. 277-105-5.

[4]Petitioner also alleged that she "was rebuffed" (she did not say by whom) when she inquired about an abortive spring choral trip that was being organized by choir members and their parents. 10th Circuit Appendix at 11.

justified in wanting to see petitioner's evidence prior to authorizing full-blown discovery into her teacher's entire career. *See, e.g.*, 10th Circuit Appendix at 443 (plaintiff's counsel apologizing for placing quotation marks in brief around what were merely "fair summary phrases"). And when put to her proof, petitioner's case was indeed less than met the eye. For example, petitioner's only witness for her allegation that Mr. Torgerson said, "I bring religion into the classroom, and I ask my students to do the same" turned out to be her mother—who ended up testifying that Mr. Torgerson actually had said something quite different: "I don't believe in leaving my religion at home and ask my students not to do the same." (A91.)[5]

In sum, the district court did not even dismiss petitioner's amended complaint, much less do so without construing it in her favor. Rather, the district court permitted discovery on the essential elements of her proposed amended complaint and then held filing it to be futile since it would still be dismissed and, in any event, could not survive summary judgment. (A106.) The Court of Appeals properly held that that was not an abuse of discretion.

B. There Are Alternative Grounds For Affirmance of the Court of Appeals' Decision That Complicate the Procedural Posture of the Petition

There are important alternative bases for affirmance. The district court held that petitioner's "claim for damages as to all defendants . . . is barred by the qualified immunity doctrine."

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[5]Petitioner's ways have not changed. Despite being reminded of this discrepancy in the Court of Appeals (Brief for Defendant-Intervenors-Appellees at 39), petitioner persists in her misquote in this Court. *See* Pet. at 4.

(A109). For its rationale, the district court referred, (A108 n.80), to its earlier opinion dismissing the original complaint. That opinion is reported at 900 F. Supp. 254, 264-65 (D. Utah 1995). The argument for affirmance based on qualified immunity was presented to the Court of Appeals. Brief of District Appellees at 44-45. Also briefed to the Court of Appeals, *id.* at 36-43, were the issues of the restrictions on the liability for damages of the school district under *Monell v. Department of Social Services*, 436 U.S. 658 (1977), and the restrictions on damages based on supervisory liability claims in the Tenth Circuit under *Gates v. Unified School Dist.*, 996 F.2d 1035, 1041 (1993). Brief of District Appellees at 36-45; *Cf.* A77 n.13 (Murphy, J., dissenting) (noting "the remaining multitude of alternative dispositive issues addressed by the parties on appeal.").

The doctrine of qualified immunity and these other doctrines restricting damage claims are important here because damage claims are all that remain. The Court of Appeals held that all of petitioner's claims for prospective and declaratory relief became moot when petitioner graduated from high school in June, 1997.[6] (A10-12.) That holding is undoubtedly correct. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (action by state employee mooted on appeal when employee left her job).

Thus, the petition comes to this Court in a very complicated posture. The true question presented is whether the district court abused its discretion in declining leave to file proposed amended damage claims, against defendants protected by qualified immunity and other doctrines, after discovery revealed

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[6]Indeed, petitioner's prospective claims probably became moot even earlier, in August, 1996, when petitioner chose to transfer from West High School to a private school, Rowland Hall-St. Mark's.

that those damage claims would (a) be dismissed, (b) be subject to summary judgment and (c) be barred by the doctrine of qualified immunity, the Tenth Circuit law of supervisory liability, and this Court's *Monell* decision.[7]

II. The Court of Appeals' Decision Does Not Conflict With This Court's Decision In *Crawford-El*

Petitioner has filed a supplemental brief calling this Court's attention to its recent 5-4 decision in *Crawford-El v. Britton*, 66 USLW 4311, 1998 WL 213193 (No. 96-827, May 4, 1998). That case does not control the outcome of this petition.

In *Crawford-El*, the Court of Appeals had "change[d] the burden of proof for an entire category of claims." *Id.* at *11. It had announced a rule requiring clear and convincing evidence for all "cases alleging unconstitutional motive." *Id.* at *12. This Court reversed, finding the D.C. Circuit's decision an unwarranted judicial amendment of the Federal Rules. *See also Leatherman v. Tarrant County*, 507 U.S. 163 (1993).

Nevertheless, in *Crawford-El*, this Court stressed that district courts retain the ability to manage unwarranted discovery into government officials' lives. For example, the Court noted, a district "court may . . . grant the defendant's motion for a more definite statement under Rule 12(e)," and "insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive." *Id.* at *14 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in

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[7]The district court also stated, as an alternative basis for its holding, that the motion for leave to amend, which followed briefing, argument and a published opinion, was untimely. The Court of Appeals questioned that holding, but did not reach it. (A42-43.)

judgment)). Likewise, "the court may postpone all inquiry regarding the official's subjective motive until discovery has been had on objective factual questions such as whether the plaintiff suffered any injury . . . ." *Crawford-El* at *15.

The course of action taken by the district court here, which the Court of Appeals affirmed, is not dissimilar. The district court, noting only conclusory allegations of motives in the proposed amended complaint, ordered discovery into whether there was any factual basis for petitioner's claim. And when discovery revealed there was not, the court properly found that it would be futile to allow filing of that complaint. A105-106; A34-42.

Moreover, unlike in *Crawford-El*, the Court of Appeals here has announced no broad rule encompassing large numbers and types of cases, and most importantly, has not changed the burden of proof. Rather its stated reasons for its limited "focus . . . on concrete manifestation of intent" (A39) center on the peculiar circumstances of challenges to "public school curricula decisions." (A40.) Indeed, the Court of Appeals emphasized this was an unusual case, adding that the task of constitutional analysis "is perhaps more appropriately undertaken on summary judgment or after trial" (A43), though in this case the district court's actions were warranted. *Id.*

III. The Court of Appeals' Holding Does Not Conflict with Other Courts of Appeals

In her first question presented, and repeatedly throughout the petition, petitioner says that the Court of Appeals held that a successful Establishment Clause plaintiff "must allege an express and contemporaneous *admission* by a state actor that the challenged conduct was intended as an endorsement of religion."

Pet. at (i) (emphasis added). *See also id.* at 7 ("requirement of contemporaneous, express admission"); *id.* at 15 (alleging circuit split over question of "express, contemporaneous admissions"); *id.* at 16 ("express contemporaneous statements").

Lest there be any doubt, petitioner charges that "the court below bars all indirect evidence of intent." *Id.* at 11. And again, petitioner alleges, "short of a statement at the time by the actor that 'my purpose is to promote religion'—virtually no allegation will suffice." *Ibid.* Thus, petitioner spends four pages demonstrating that other Courts of Appeals, in alleged contradistinction with the lower court here, consider indirect evidence of intent. *Id.* at 14-17. The Court of Appeals in this case is then said to have done something "inconsistent with centuries of Anglo-Saxon jurisprudence." *Id.* at 12. Indeed, petitioner even accuses the lower court of doing something "unique[] in the history of judicial analysis . . . ." *Id.* at 11.

The Court of Appeals' actual holding is much less historic. The court simply held that Establishment Clause challenges to the inclusion of religious art in public school curricula cannot rest on conclusory allegations of an improper purpose. Rather, claims of this sort "must be supported by allegations of *conduct* or statements" that objectively indicate an improper purpose. (A40) (emphasis added). These allegations must not "resort[] to psychoanalysis," but cite "*conduct* or statements" "expressly . . . indicat[ing]" that the defendant had an improper purpose. *Ibid* (emphasis added). In short, indirect evidence is welcome. But *some* evidence, indirect or otherwise, must be pled.

There is thus no split at all in the circuits. The other Courts of Appeals accept circumstantial evidence of governmental purpose. Pet. at 14-17. And so does the Court of Appeals in this case. It merely requires at least some alleged

facts—"conduct or statements"—that tend to demonstrate that intent.

IV. The Court of Appeals' Holding Makes Good Sense

The lower court's holding is entirely reasonable. Indeed, a different rule would invites chaos. Anytime a public school student alleged that a curriculum decision he or she found offensive was the product of hidden religious purpose that decision could become the subject of litigation in federal court—complete with searching discovery into the teacher's personal religious life and his or her entire career.

Suppose, for example, an astronomy teacher who is a New Age adherent required her students to chart the phases of the moon. Or suppose a literature teacher who was Jewish assigned his class the novels of Chaim Potok, or a drama teacher who was Catholic chose to produce *Les Miserables*. Petitioner's theory would permit any student who was offended by these curricular choices to file a federal lawsuit and take discovery into his or her teacher's religious beliefs and practices, as well as into the teacher's employment history, merely on the allegation that the teacher was attempting to advance a particular religion.

These scenarios are not fanciful. The lower federal courts have already faced similar cases. In *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), the plaintiff mounted an unsuccessful Establishment Clause challenge to including the book *The Learning Tree* in a sophomore literature class. The plaintiff alleged among other things that the book denigrated Christianity and advanced "secular humanism" in violation of the Establishment Clause. In *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680 (7th Cir. 1994), parents of public primary

school students made a similar Establishment Clause challenge to portions of the reading curriculum. Both cases were dismissed, under 12(b)(6) motions treated as motions for summary judgment. *Grove*, 753 F.2d at 1532-33; *Fleischfresser*, 15 F.3d at 684-85. *See also Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373 (9th Cir. 1994) (Establishment Clause challenge to reading curriculum allegedly promoting witchcraft); *Smith v. Board of School Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987) (Establishment Clause challenge to various textbooks); *Mozert v. Hawkins County Bd. Of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (same).

There is no question that the plaintiffs in all those cases were sincere. There is likewise no doubt that there are countless other potential plaintiffs just like them. As this Court has noted, "[p]eople may take offense at all manner of religious as well as nonreligious messages." *Lee v. Weisman*, 505 U.S. 577, 597 (1992).[8] If all that were required to obtain discovery and perhaps proceed to trial were a combination of personal offense taken plus an allegation of improper purpose there would be no end to curriculum challenges. As Judge O'Scannlain wrote for the court in *Brown*, "If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself." 27 F.3d at 1379.

Respondents agree that the Establishment Clause is in need of clarification. We respectfully disagree, however, that a

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[8]The Court pointedly added that "offense alone does not in every case show a violation." *Ibid.*

procedurally complex case about the role of religious music in an arts curriculum is a promising place to begin.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

—v.—

WEST HIGH SCHOOL, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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No. 97-1764

In The

Supreme Court Of The United States

October Term, 1997

RACHEL BAUCHMAN,

Petitioner,

vs.

WEST HIGH SCHOOL, *ET AL.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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1. The American Jewish Congress and Americans United for Separation of Church and State respectfully seek leave to file the attached brief *amici curiae* in support of Petitioners.
2. The Petitioners consented to the filing of this brief; Respondent Torgeson and Intervenors consented; other Respondents have not responded to our request for leave.
3. Both *amici* routinely are involved in Establishment Clause litigation. The pleading standards created below are thus important to their ongoing work.
4. For these reasons, the two organizations respectfully request permission to file the attached brief.

Marc D. Stern

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INTEREST OF THE *AMICI*

The American Jewish Congress (AJCongress) is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews.

***

Americans United for Separation of Church and State is a national, nonsectarian organization committed to preserving religious liberty and separation of church and state. Americans United has appeared frequently before the Court on church-state issues and filed a brief in the Tenth Circuit below.

ARGUMENT

There are three compelling reasons to grant a writ of certiorari: the decision below imposing a heightened pleading requirement where motive is at issue is in direct conflict with *Crawford-El v. Britton*, 66 U.S.L.W. 4311 (1988); it imposes almost no limits on the use of religious music in public schools, in conflict with the decision of the Eighth Circuit in *Florey v. Sioux Falls School District* 49-5, 619 F.2d 1311 (8th Cir. 1981); and it rejects binding holdings of this Court that government may not act with religious motives or with a religious purpose.

I. THE DECISION BELOW CONFLICTS WITH *CRAWFORD-EL*

A. The Original Complaint

The panel decision flies in the face of the regime of notice pleading mandated by the Federal Rules of Civil Procedure ("Rules"). The decision below imposed a stricter pleading regime in Establishment Clause motive cases than *Crawford-El* permits.

With limited exceptions noted in Rule 9(b) regarding fraud or mistake, which must be pled with particularity, all the Rules require of a complaint is a "short and plain statement" of the claim sufficient to put defendant on notice. Rule 8(a). The Rules specifically sanction general pleadings where a state of mind (*e.g.*, motive) is relevant. *Id.* This Court's recent decision in *Crawford-El v. Britton* explicitly relied on the Rules to invalidate a District of Columbia Circuit rule imposing heightened requirement of particularized pleading and proof in motive cases.

Notwithstanding these long-settled principles, and their recent reaffirmation in *Crawford-El*, the panel majority insisted on particularized claims of illicit motive:

> [I]n her original complaint, Ms. Bauchman alleges no facts to expressly indicate the purpose for selecting a majority of religious songs to be sung at religious venues or that the Choir curriculum has the effect on a reasonable observer of advancing or endorsing religious beliefs. .... We will not infer an impermissible purpose or effect in the absence of

> any supporting factual allegations. See *Lynch v. Donnelly*, 465 U.S. at 680 (1984) (district court erroneously inferred from religious nature of creche that city had no secular purpose for display) ....

[A-23]

As *Lynch* reached this Court, it was not a sufficiency of a pleading case, but a judgment on a full trial record. *Lynch* does not illuminate the standard to be applied to judging the sufficiency of a pleading.

A case may not be dismissed at the pleading stage unless, under any set of facts which might be proven, plaintiff cannot prevail. *Conley v. Gibson*, 355 U.S. 41 (1957. Petitioner Bauchman, having alleged that religious songs were sung in religious venues clearly could have proven a set of facts about her original claim sufficient to survive a motion to dismiss, *i.e.*, that the teacher or the district acted with a motive of aiding religion, or that the overall effect of the choices, combined with the venue in which they were sung, was to endorse religion.

Nothing in *Lemon v. Kurtzman*, 403 U.S. 621 (1971), or any subsequent case applying its three-part test, suggests that the test was other than one for evaluating proof. Nowhere did the *Lemon* Court suggest that a plaintiff need allege any of its elements generally, much less with particularity. A party is not, in any event, required to plead a legal theory. *Conley, supra*; *Bartholet v. Reishavier A.G.* (Zurich), 953 F.2d 1073 (7th Cir. 1992).

That the court below confused pleadings and proof is evident from what follows the above quoted paragraph. The majority faulted Bauchman's complaint not only for failing to allege *in hæc verba*, a sectarian purpose, but also for failing to negate any possible secular purpose. The upshot is that an entire Establishment Clause case, proof and negation of any possible defenses must be pled at the outset without benefit of discovery, and subject to Rule 11 sanctions for unsustainable claims, on pain of dismissal for failure to state a claim. This is surely not notice pleading. It is a not-so-subtle way of excluding Establishment Clause claims at the threshold.

The majority reasoned that:

> [We] cannot allow Ms. Bauchman to support her claim with allegations focused solely on the religious component of classroom activity, since such approach would inevitably lead to invalidation of the activity under the Establishment Clause.

[A-24]

This again confuses pleading with proof. One can plead that a practice violates the Establishment Clause, but fail to prove it. That possibility of a failure of proof does not justify a dismissal for failure to state a claim, any more than the possibility that a claim of an unreasonable search will fail of proof precludes the claim that it was unreasonable.

B. The Amended Complaint

Even if the original complaint was deficient in failing to specifically allege a purpose of advancing religion, the

proposed amended complaint amply made up for the deficiency. Indeed, the panel conceded that it adequately alleged improper motive. [A-37] Bauchman proffered substantial evidence that, before the present controversy alerted him to the risks of such statements, her teacher had made statements and taken actions which indicated a religious purpose, in both choice of song and venues, and made statements which might be taken as attacks on anyone who did not share the teacher's religious beliefs.

The court below nevertheless refused to permit the filing of an amended complaint, because the proposed amended complaint did not offer "contemporary evidence" of such a purpose. [A-39] In addition to repeating its criticisms of Bauchman's original complaint, it insisted that only evidence of a statement by the teacher during the year Bauchman was in the choir would suffice. Evidence of motive and intent from prior school years was ruled irrelevant.

This novel evidentiary proposition is at odds with settled rules of evidence, F.R.Ev. 404(b) and cases such as *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *UMW v. Pennington*, 381 U.S. 657, 670 n.3 (1965), all permit consideration of prior conduct as evidence of present motive.

Under the Tenth Circuit's ruling, a complaint is insufficient if it alleges that a teacher instituted an arguably religious curriculum, announced at its inception that she was incorporating religious materials because she wished to glorify God and save students from hell, continued the same

program without change for decades, but failed to announce yearly her religious purpose. That cannot possibly be right.

Surely no one would suggest that if a government official announced a racist motive in adopting a policy, and kept that same policy in place unchanged for years, someone adversely affected later could not proffer the original comment as proof of the policy's racial taint. The argument would fail because it was rejected in *Hunter v. Underwood*, 471 U.S. 222 (1985), where a century-old illicit racist motive invalidated a felon disqualification law. *Cf. City of Mobile v. Bolden*, 446 U.S. 88 (1980). Establishment Clause claims should be no different, or if they are, this Court should explain why.

The Tenth Circuit thought its limitation on the use of evidence necessary to protect religious public officials from harassment and inquiry merely because they were religious. [A-41] *Crawford-El* teaches that the possibility of abusive discovery cannot justify higher standards of pleading. Discovery abuses can be controlled by the district court, as the *Crawford-El* majority noted. The district courts can supervise depositions, order progressive discovery or enter protective orders.

The singing of religious songs during religious holidays by a public school choir in houses of worship is permissible only if done with a secular educational purpose, sufficient to displace the religious nature of the program. Prior evidence of an illicit purpose is surely sufficient for pleading purposes to permit further inquiry, not because the official conducting

the program is religious, but because his acts were arguably a continuation of unconstitutional conduct.

In short, Bauchman had stated a claim. It was an error to dismiss the complaint. The error was compounded when Bauchman was denied leave to file a detailed and particularized amended complaint. The pleading rules applied below are inconsistent with *Crawford-El*, the Federal Rules of Procedure, and the Federal Rules of Evidence. If left unreviewed, the decision below would create uncertainty about procedure in an important category of constitutional cases.

II. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE EIGHTH CIRCUIT IN *FLOREY V. SIOUX FALLS SCHOOL DISTRICT 49-5*

The second reason to grant certiorari is the question of what (if any) restrictions apply to the use of religious music in the public schools. This Court has never addressed that question. Nevertheless, it annually confounds educators, school boards and communities.

The panel decision, giving blanket permission for public schools to use religious music irrespective of its sectarian religious content—provided that school officials do not foolishly confess an actual religious purpose—is in considerable tension, if not outright conflict, with *Florey v. Sioux Falls School Dist. 49-5*, *supra*, which, while permitting religious music to be used for educational purposes, imposes far greater restraints on its use.

Florey involved a facial challenge to rules permitting use of religious music as part of a secular program of education when done in a "prudent and objective manner." While upholding the rules, the Eighth Circuit acknowledged that activities undertaken pursuant to the rules could be subject to meritorious "as applied" challenges. It specifically cited a particular "play" performed in an earlier year as "predominantly religious" and hence impermissible, and exceeding constitutional bounds. 619 F.2d at 1317-18. It concluded that the constitutionality of "any particular school activity ... cannot be determined until and unless there is a specific challenge, supported by evidence ...." *Id.* at 1319.

By contrast, the Tenth Circuit held that even a specific challenge to specific programs cannot withstand a motion to dismiss absent a contemporaneous confession of unconstitutional purpose. It also somehow decided that singing religious hymns is not a prayerful activity [A-21, n. 8], and hence not unconstitutional, even though religious songs are a well-nigh universal religious practice, and even though a practice may be religious for constitutional purposes but not prayerful. Accord, *Stone v. Graham*, 449 U.S. 39 (1981) (Ten Commandments in school). To make matters worse, Bauchman's amended complaint alleges that her teacher verbally excoriated her, making her dissent from her teacher's religious beliefs quite relevant to her standing in the school community. *Lynch v. Donnelly*, 465 U.S. 668, 689-90 (1984) (O'Connor, J., concurring). None of this was sufficient to state a claim.

The resulting inter-circuit conflict is certain to confuse school districts as they struggle with whether and how to perform religious music.

III. The Decision Below Defies Numerous Decisions of This Court

These two errors arise from a third, more serious error. The court below announced that it was convinced that this Court erred in considering motive and purpose in Establishment Clause cases. Endorsing the dissenting views of Justices Rehnquist and Scalia, the majority of the Tenth Circuit concluded:

> [W]e agree [the purpose test] is an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect. Nevertheless, the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general, cautions us to apply both the purpose and effect components of the refined endorsement test ....

[A-20-21]

On the most generous reading, this reads like a judicial petition for certiorari, which *amici* agree should be granted. At worst, it is a brazen defiance of the judicial hierarchy which colored the court's judgment on the elements of proper allegations of improper religious purpose. That defiance must be corrected. "Unless we wish anarchy to prevail within

the federal judicial system, a precedent of this Court must be followed by the lower federal courts not matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 364, 375 (1982). Either way, review here is warranted for this Court to decide whether—and we hope to reaffirm that—government may act for secular purposes only.

CONCLUSION

For the reasons stated, a writ of certiorari should issue.

Respectfully submitted,

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RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN FEDERATION OF SCHOOL ADMINISTRATORS AND THE ASSOCIATION FOR SUPERVISION & CURRICULUM DEVELOPMENT AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*

Amici[1/] are the American Federation of School Administrators and the Association For Supervision & Curriculum Development. They are national organizations of educators and administrators, charged with teaching a complete, well-rounded, public school curriculum to the roughly 40 million school-age children attending this nation's public schools. In carrying out their educational tasks, *amici* are also obliged to ensure the safety of the children and adolescents entrusted to their care, and to ensure the protection of their constitutional and civil rights. *Amici* seek to ensure that each public school curriculum (and extra-curriculum) reflects, to the extent appropriate and to the extent constitutional, the needs and desires of the particular community in which the school lies. They also have a duty to protect the academic freedom and religious freedom of the teachers employed by the public schools. *Amici* urge review and reversal of the decision below, *Bauchman* v. *West High School*, 132 F.3d 542 (10th Cir. 1995), because that decision improperly dismantles the wall of separation between church and state in the public schools, and will make their discharging of these varying goals and responsibilities considerably more difficult, if not impossible. All parties have consented to the filing of this Brief and their letters of consent have been filed with the Court.

SUMMARY OF ARGUMENT

Citing the "confusion" and "inconsistency" in this Court's Establishment Clause jurisprudence, and apparently as a consequence misconstruing the pertinent precedents, the Tenth

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[1/] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Circuit in *Bauchman* effectively dismantled the wall of separation between church and state in the public schools, allowing a public school teacher to continue a 20-year program of proselytism and harassment of religious dissenters.

In dismissing Ms. Bauchman's claims and denying her leave to amend her complaint, the Tenth Circuit relied on numerous incorrect statements of the controlling law. Most notably, it dispensed with the first two prongs of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), altogether, on the ground that the purpose prong of *Lemon* "is an unworkable standard that offers no useful guidance to courts," 132 F.3d at 552, substituting a watered-down version of the endorsement test, and then relying on the proposition that the Establishment Clause is violated only if the State has *no* plausible secular purpose for its actions. *Id.* at 554. It further suggested that the inquiry into "purpose" does *not* entail consideration of the government actor's subjective intent. *Id.* at 560. Further, the Tenth Circuit applied a "reasonable observer" standard in assessing whether the effect of Mr. Torgerson's actions was to advance religion. *Id.*

These are clear errors of law. *Amici* submit that despite the fragmentation in the governing Supreme Court precedent, Mr. Torgerson's conduct was unquestionably beyond the pale. The Court should make it perfectly clear that Courts of Appeals may not hide behind conflicting *dicta* in the governing jurisprudence in order to sanction proselytism.

ARGUMENT

Amici adopt the statement of the case in the Petition For Writ of Certiorari filed by Rachel Bauchman on April 27, 1998. They write separately to emphasize one aspect of the factual makeup of the case.

The Tenth Circuit's most fundamental error was its view that it fell within an existing line of cases involving "religious choral music." *See Doe* v. *Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995); *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980). This case, however, is *not* about the constitutionality of the inclusion of religious songs in a choral curriculum. It is about the constitutionality of proselytism in a public high school setting.

A. THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE, WHICH THE TENTH CIRCUIT CHARACTERIZED AS "MUDDLED," IS IN NEED OF CLARIFICATION.

This Court's Establishment Clause jurisprudence is often criticized for a lack of clarity and consistency. *See*, *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (deploring the Court's "embarrassing Establishment Clause jurisprudence"); *Rosenberger* v. *University of Virginia*, 515 U.S. 819, 861 (1996) (Thomas, J., concurring) (characterizing the Court's Establishment Clause jurisprudence as in "hopeless disarray"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part) (observing that jurisprudence may be in need of "[s]ubstantial revision").

The fragmentation of the Court's decisions in this area, *see*, *e.g.*, *Agostini* v. *Felton*, 117 S. Ct. 1997 (1997) (Opinion of the Court delivered by O'Connor, J., in which Rehnquist, C.J., and Scalia, Kennedy, and Thomas, JJ, joined) (dissent of Souter, J., in which Stevens and Ginsburg, JJ, joined, and in which Breyer, J., joined as to Part II) (dissent of Ginsburg, J., in which Stevens, Souter, and Breyer, JJ, joined), and the seeming-adoption of a multitude of potentially applicable tests

for the public school context,[2] have prompted Courts of Appeals addressing religion in the public schools to preface their analyses with remarks on the confusion in the governing law. *See*, *e.g.*, *Bauchman*, 132 F.3d at 551 (referring to the "existing, muddled Establishment Clause precedent"). In short, the "confusion" and "muddle" in the Supreme Court cases — a natural, but unfortunate, result of fragmentation in the Court's opinions — has seemingly left some Courts of Appeals with the impression that they have a wide latitude of choice among the Court's *dicta* in this critical area of First Amendment law, allowing them to acquiesce in impermissible breaches of the wall of separation between church and state. The decision of the Tenth Circuit below is illustrative.

B. THE TENTH CIRCUIT IN *BAUCHMAN* MISCONSTRUED THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

1. The Tenth Circuit's approach to the "purpose" inquiry was fundamentally flawed.

This case presents fundamental issues as to the nature of the "purpose" inquiry in Establishment Clause cases: whether the "endorsement" test has replaced the *Lemon* test; whether a defendant need only articulate some plausible secular

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[2] The Courts of Appeals appear to believe there are three "separate" tests of constitutionality under the Establishment Clause: the *Lemon* test from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), an endorsement test stemming from Justice O'Connor's concurrence in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and a coercion test stemming from Justice Kennedy's opinion in *Lee* v. *Weisman*, 505 U.S. 577 (1992). *See*, *e.g.*, *Duncanville*, 70 F.3d at 406 (using all three "tests" to affirm an injunction against a school and its employees from leading, encouraging, promoting, and participating in prayers with or among students during curricular or extracurricular activities).

purpose; how a state actor's intent is to be probed by a reviewing court; and what sort of factual allegations on the issue of purpose suffice to defeat a motion to dismiss in federal court. The Tenth Circuit's approach to the purpose inquiry, in which it dispensed with *Lemon*, ruled that the Establishment Clause is violated only when the conduct in question is wholly motivated by religious considerations, and concluded that the Clause does not require a subjective inquiry into the intent of the state actor whose conduct is at issue, was plainly wrong.

a. The "endorsement" test neither replaces nor eviscerates the purpose prong of the *Lemon* test.

Writing that the endorsement test "is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims," the Tenth Circuit chose to "apply both the purpose and effect components of the refined endorsement test" when evaluating Ms. Bauchman's claim. 132 F.3d at 552. It then held her to a requirement of showing that Mr. Torgerson had *no* secular purpose for selecting songs with religious content and having the choir perform in religious venues (thus conveniently dispensing with the remaining factual allegations relating to proselytism). Finding a number of "plausible" secular purposes (outside the record), the court ruled that Ms. Bauchman's complaint "fail[ed] to state an Establishment Clause claim under the purpose component of the endorsement test." *Id.* at 555.

The Tenth Circuit's analysis reflects a fundamental misunderstanding of the role of the three prongs of *Lemon*. As the Court wrote in *Lemon* itself, to be constitutional, a challenged statute (or, here, a state actor's conduct) must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not

foster excessive entanglement with religion. *See Lemon*, 403 U.S. at 613. This is nothing more than an articulation of a straightforward and traditional "purpose and effect" inquiry, and a recognition of the clause's ban on government "intermeddling" in the affairs of religion.

The endorsement inquiry articulated in *Lynch* by Justice O'Connor (but not accepted as a substitute for *Lemon* by the Court)[3] does *not* dispense with this traditional inquiry into the purpose and effect of a challenged government action. Indeed, the Tenth Circuit erred in further "watering down" the endorsement test by dispensing with the subjective inquiry into actual purpose. As the dissent in *Bauchman* noted, "Justice O'Connor, the originator of the endorsement test, believes the proper focus . . . is the subjective purpose of the governmental actor." 132 F.3d at 565 (Murphy, J., concurring in part and dissenting in part). Judge Murphy concluded from his own review of the post-*Lynch* cases that "a majority of the Court would invalidate any governmental action subjectively intended to endorse religion." *Id.*

In short, contrary to the ruling of the Tenth Circuit, the *Lemon* test requires a rigorous examination of a government actor's subjective purpose and his actual effect; and the so-called endorsement test (which in any event does not "replace" *Lemon*) requires nothing less.

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[3] *See, e.g., Allegheny*, 492 U.S. at 669 (Kennedy J., concurring in part and dissenting in part) (joined by Rehnquist, C.J., and White and Scalia, JJ.) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice.").

b. There is no basis for the Tenth Circuit's refusal to consider Mr. Torgerson's actual intent.

The Tenth Circuit next took the puzzling position that "any attempt to use allegations regarding Mr. Torgerson's past conduct to evidence a continual controlling unexpressed or psychological motive to further a religious purpose by selecting religious songs and religious performance venues oversteps . . . pragmatic limits on the nature of our inquiry into the 'actual' *purpose* of the challenged conduct. Put simply, our examination must stop short of an attempt to discern a defendant's psychological *motives* vis-à-vis his past conduct, underlying belief system or religious character." 132 F.3d at 560. The majority continued, "Torgerson's 'psychological motive' in selecting the Choir's repertoire and performance venues is constitutionally irrelevant in determining whether he acted with the 'actual purpose' of advancing religion." *Id.* at 563.

The Tenth Circuit's erroneous dichotomy between "subjective motive" and "objective purpose" reflects its misreading of a comment in the *Mergens* decision (which in any event dealt with a statute, rather than individual conduct). As Justice Stevens observed in that case, the government may not act with the personal subjective view "that it would be desirable for people to be religious or to adhere to a particular religion." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 286 n.21 (1990) (Stevens, J., dissenting). At the same time, the Establishment Clause is not ordinarily concerned with "whether the legislature [or a government actor] itself behaved religiously." *Id.* *Amici* agree that the Clause does not require an inquiry into whether Mr. Torgerson himself acted out of religious fervor (*i.e.*, whether he believed his own religion compelled him to the actions in question). However, the Clause unquestionably required the Tenth Circuit to determine

whether Mr. Torgerson subjectively intended to convert, to further religion, to preach, or to proselytize.[4] And the allegations in Ms. Bauchman's amended complaint unequivocally point to an intent to proselytize.[5]

c. Articulation of some "plausible" secular purpose is insufficient to pass Establishment Clause review.

The Tenth Circuit's position that the Establishment Clause is only violated when the conduct in question is wholly motivated by religious considerations — *i.e.*, when the reviewing court can identify no plausible secular purpose, 132 F.3d at 553-55 — is incorrect as a matter of law.

Although *dicta* in *Lynch* suggest that a plaintiff must show that the defendant's actions were "motivated wholly by

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[4] The distinction is between "why" a person takes a step, and "to what end" he takes that step. Both are subjective inquiries. The Establishment Clause may well forbid the former inquiry (was he acting religiously, *i.e.*, did Mr. Torgerson believe he would suffer eternal damnation if he failed to proselytize, or did he merely believe he would not be fulfilling his duties as a member of the Mormon Church); however, it *requires* the latter inquiry (did he intend to convert and proselytize, or did he intend something more innocuous).

[5] *See, e.g.*, Amended Complaint (AC) ¶ 16b (forcing students to attend offering of prayers and sacraments); ¶ 16g (frequent discussion of religions content of songs in order to advocate his own beliefs); ¶ 16k (invoking prayers during choir tours); ¶ 16e (frequent performance at religious venues); ¶ 16l (instructing class that they should understand and accept the religious message of the songs); *see also Petition* at 3-4 (Torgerson admitted his preference for Mormon students; the class under Torgerson's direction regularly participated in Mormon worship services; Torgerson wrote to choir parents that he had "trouble with this separationist concept"; and he instructed his class that a true appreciation of music comes through religious experience).

religious considerations," 465 U.S. at 680, the author of the endorsement test has herself taken a different position. *See id.* at 690-91 (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.").

To be sure, the Tenth Circuit's position draws comfort from Justice O'Connor's concurrence in *Wallace* v. *Jaffree*, where she wrote that "the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited," and that "[i]f a legislature expresses a plausible secular purpose . . . , then courts should generally defer to that stated intent." 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring). This *dictum*, however, reflects merely the conventional wisdom that (federal) courts should be deferential to (federal and state) legislatures regarding the purpose of legislation. Deference is inappropriate and unnecessary when a case involves instead the behavior of an individual state actor. Concerns expressed by Justice Scalia and Chief Justice Rehnquist about discerning the motive of individual legislators, *see*, *e.g.*, *Aguillard*, 482 U.S. at 625, 632-33, 636-38 (Scalia, J., dissenting), simply do not apply in the context of an individual actor who can be cross-examined. *See also* Charles Black, Structure and Relationship in Constitutional Law 77-93 (1969) (arguing that review of articulated purpose should become less deferential the smaller the government body in question). Moreover, deference to a state's articulation of secular purpose is belied by the Supreme

Court's actual practice. The Court has repeatedly made it plain that a "sham" secular purpose will *not* be tolerated.[6/]

Amici contend that the proper result at the initial pleading stage was articulated in *Board of Education* v. *Pico*, 457 U.S. 853 (1982), and continues to apply in "mixed motive" cases. A complaint survives dispositive motions if it alleges facts showing any actual (subjective) improper purpose behind the challenged actions. In *Pico*, for instance, the plaintiff's factual allegation of an actual improper purpose for the school board's removal of books from the school library in question (disagreement with the social and political views expressed therein) was deemed sufficient to defeat a motion to dismiss, despite the obvious possibility of other plausible explanations. Under the *Pico* precedent, Ms. Bauchman's allegations of improper purpose are more than adequate to keep her case in federal court and to require a trial on the issue. *See id.* at 875 (noting that the "evidence at most creates a genuine issue of material fact on the critical question of the credibility of petitioners' justifications for their decision").

[6/] *See e.g.*, *Aguillard*, 482 U.S. at 586-87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."); *Epperson* v. *Arkansas*, 393 U.S. 97, 108 (1968) (striking down anti-evolution statute that forbade public school teachers from teaching theory of evolution, citing newspaper advertisements and letters supporting adoption of the statute, and observing that it is "clear that fundamentalist sectarian conviction was and is the law's reason for existence"). Both of these decisions entailed a fairly rigorous judicial inquiry into the actual purpose of the measures at issue.

d. The Tenth Circuit's purpose analysis undermines *amici*'s ability to protect minority and dissenting students.

The Tenth Circuit's approach to the purpose inquiry tells teachers that they may attempt to convert, and that they may preach, discriminate, and harass, so long as they *also* have a plausible (not even an "actual") secular goal in so doing. It tells administrators that they should not bother to police classrooms for harassment, and tells principals that it would be a waste of time to sanction teachers for proselytism. Indeed, under the "any plausible secular purpose" standard, students and parents have little incentive to report arguably unconstitutional incidents to the authorities. This casual approach to protection of fundamental constitutional rights — extreme deference to any plausible explanation for harassing behavior — would be flatly unacceptable in the context of racial harassment and discrimination; it should be equally unacceptable in the context of proselytism.

2. The Tenth Circuit's approach to the "effect" inquiry was also clearly incorrect.

a. The Establishment Clause requires an inquiry into the purpose *and* the effect of a challenged action.

Amici do not suggest that a state action violates the Establishment Clause simply because the motives of the state actors in question were improper. If Mr. Torgerson had intended to advance Christianity in his classroom but had been wholly ineffective — not in fact advancing it, not in fact endorsing it, and not in fact pushing dissenting adolescents to the social outskirts of his classroom — then although his actions would have been improper, the clause might not have

been contravened. (One might call this "harmless error.")[2/] This is not such a case. Ms. Bauchman has made a clear showing that Mr. Torgerson's motives were improper, *and* — as explained below — that the effect of his actions was impermissible.

b. The Tenth Circuit was incorrect to hold Ms. Bauchman to a "reasonable observer" standard on the question of the effect of Mr. Torgerson's actions.

Another issue in the case is whether the "effect" of a challenged practice is to be measured by an objective or subjective standard. The Tenth Circuit was plainly wrong in its approach to the issue, which was to judge by a reasonable observer standard and to discount Ms. Bauchman's allegation of the effect of Mr. Torgerson's actions on the grounds that she was describing the "subjective effect of the curriculum on [herself]." 132 F.3d at 555.

The "reasonable observer standard" finds limited support in the writings of Justice O'Connor. *See Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J. concurring) (stating that "the

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[2/] To say that improper purpose alone will not prove an Establishment Clause violation is not to say that it is irrelevant. Take by way of analogy the inclusion of Mark Twain's *Huckleberry Finn* in a sixth grade public school classroom. Imagine that the sole black pupil in the class were to complain that the inclusion of the book and, particularly, class discussions and enactment of certain portions of the book demeaning to blacks, made her feel "second class." Absent discriminatory intent, an equal protection claim would not lie. *Washington* v. *Davis*, 426 U.S. 229 (1976). But if there were evidence that the teacher's intent in assigning the book and assigning "skits" from the storyline was, precisely, to stamp the black students with the *stigma* of the past (a "badge" of "slavery"), then the equal protection claim would be complete.

endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe"). And it may make sense in the sort of Establishment Clause challenges wherein it was first articulated — cases involving government symbols that give the appearance of institutional endorsement of religion. *See, e.g., Allegheny,* 492 U.S. at 595 (Blackmun, J.) (suggesting endorsement test is "a sound analytical framework for evaluating governmental use of religious symbols").

But the "reasonable observer standard" is wholly inconsistent with the "insider/outsider doctrine" also articulated by Justice O'Connor. Under this principle, which reflects in part the religious persecution to which our founding generations had been exposed in the Old World, government action is invalid under the Establishment Clause if it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688. This is inherently and inescapably a subjective inquiry, and the facts of this case suggest precisely this insider/outsider effect.[8/]

If the "effect" inquiry is to be meaningful in a case, it must be situationally specific. In this case, the inquiry must be the effect of Mr. Torgerson's practice on a "reasonable adolescent religious dissenter" under the circumstances *and* on Rachel Bauchman in particular. *See* Note, *Religion and the*

[8/] *See, e.g.*, AC ¶ 16d (application form for choir class inquiring about religious affiliation); ¶ 16o (berating dissenting students); ¶ 17d (inciting Mormon parents and children to punish and ostracize Ms. Bauchman); ¶ 17e (suggesting Ms. Bauchman leave choir class).

State, 100 Harv. L. Rev. 1606, 1648 (1987) ("[If the test] is governed by the perspective of the majority, it will be inadequately sensitive to the impact of government actions on religious minorities, thereby in effect basing the protection of religious minorities on the judgment of the very majority that is accused of infringing the minority's religious autonomy. If the Establishment Clause is to prohibit government from sending the message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received by the minority or nonadherent."); *see also* Laurence H. Tribe, American Constitutional Law § 14-5 at 1177 (2d ed. 1988) ("At least concerning public schools, the endorsement question ought to be asked from two perspectives: that of an objective observer sympathetic to free exercise concerns, and that of the students involved.").

The Tenth Circuit's abandonment of a subjective effect inquiry eviscerates the basic proposition that the Establishment Clause promises protection from majoritarian oppression. It would render meaningless efforts by *amici* to police the schools for harassment of individual students by teachers. It would deny *amici* their ability to respond to complaints from individual students, and indeed provides no guidance to *amici* when faced down by religious majorities seeking to impose a sectarian agenda in the local public schools.

3. The notion, seemingly embraced by the Tenth Circuit, that unconstitutional coercion cannot occur outside the context of a formal prayer exercise, was also erroneous.

The Tenth Circuit declined to examine the coerciveness of Mr. Torgerson's religious agenda, 132 F.3d at 552 n.8, essentially on the theory that the case was not a "school

prayer" case. This reflects a misunderstanding of the Court's coercion analysis. While a plaintiff need not prove coercion in order to prove an Establishment Clause violation, coercion *can* occur in the public schools outside the context of a formal religious exercise, and Ms. Bauchman made a plain showing of coercion.

The First Amendment "guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992). *See also Engel* v. *Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *see also Wallace*, 472 U.S. at 60 n.51 ("This comment has special force in the public school context where attendance is mandatory."). The observation that religious coercion has no place in our system of separated church and state, however, does not mean that Establishment Clause plaintiffs must always allege and prove coercion. Indeed, as Justice O'Connor observed in the *Allegheny* case, a rule of law that "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not . . . adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community." *Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring in part and concurring in the judgment, joined by Brennan and Stevens, JJ.)

In any event, Ms. Bauchman presented considerable evidence that Mr. Torgerson's religious agenda was coercively

imposed.[9] Her ability to excuse herself from choir (*i.e.*, because the class was elective and because she was given the option of sitting out of religious programs while still receiving an A) cannot as a matter of law wipe out the improper purpose and effect of Mr. Torgerson's proselytism. Permitting the excusal option to negate Establishment Clause violations effectively amounts to a rule that individual school teachers and the school systems may preach and proselytize in class, so long as the classes are elective. This is, of course, flatly inconsistent with the rulings in *Edwards* v. *Aguillard*, 482 U.S. 578 (1987), and *Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). In both of these cases, the Court made it clear that religious activities on public school premises from which students may excuse themselves are — despite the excusal option — impermissible.[10]

Moreover, as Justice Brennan's detailed concurrence in *Schempp* explains, the excusal option does not remedy the Establishment Clause problem in the public school systems precisely because school children in particular are highly susceptible to peer group pressure where important norms and values are involved. *Abington School District v. Schempp*, 374 U.S. 203, 290-91 (1963). *See also McCollum* v. *Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) ("That a child is offered an alternative may reduce

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[9] *See, e.g.*, AC ¶ 16b (requiring prospective students to identify their religion on class application forms); ¶ 16h (stating he disagreed with Supreme Court decisions forbidding advocacy of religion in public schools); ¶ 16n (suggesting students who dislike prayer at graduation should "plug their ears").

[10] Portions of *Ball* were overruled last term, *see Agostini* v. *Felton*, 117 S. Ct. 1997 (1997), but the jurisprudential evolution in question involved the extent to which "Shared Time" programs constitute aid in furtherance of religion. The excusal option was not at issue.

the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.").

C. THE TENTH CIRCUIT DECISION, IF ALLOWED TO STAND, WILL MAKE COMPLIANCE WITH THE LAW MORE DIFFICULT FOR THE *AMICI*.

1. As a matter of principle, the wall of separation between church and state should be impenetrable in the public schools.

Any intrusion of church into the public schools is inconsistent with the basic mission of the public school system. Public education is designed to prepare the young for fully-educated participation in the civic democracy, to educate them in secular and worldly subjects, so that they may make informed decisions as adults. *See Everson* v. *Board of Education*, 330 U.S. 1, 23-24 (1947) (Jackson, J., dissenting) (noting that the public schools are organized "on the premise that secular education can be isolated from all religious teaching so that the school can impart all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion" and that "[t]he assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion"). These goals cannot be effectuated if the school system has become a machine for the advancement of particular religions, or if internal strife and division along religious lines has become a primary feature of the classroom. *See Schempp*, 374 U.S. at 241-42 (Brennan, J., concurring) (noting that "the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort — an atmosphere in which children may assimilate a heritage common to all American groups and religions").

Further, intrusion of church into the public schools is particularly problematic given the unique susceptibility of children and adolescents to peer pressure when social norms are involved. Indeed, this fact exacerbates and magnifies the possibility of violations of religious liberty and the possibility of coercion. This Court has consistently and correctly recognized that children and adolescents are uniquely subject to the influence of teachers, administrators, and other students. They are particularly vulnerable to policies exhibiting a preference for one religion or another. *See Ball*, 473 U.S. at 390 ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."). The risk of undue influence warrants especial vigilance on the part of educators and on the part of the courts regarding any practice that might plausibly be unconstitutional.

2. As a practical matter as well, the wall of separation between church and state should be impenetrable in the public schools, and the ban on proselytism should be absolute.

Court decisions that permit "some" intrusion of religion, on a complicated set of facts, leave the door open for considerable disagreement at the student, school, school board, parent, and community level about "what else is permissible." Thus, for instance, if the same facts were to arise in a different high school in the Tenth Circuit, subject to just slightly nuanced variation — for example, all of the same alleged facts ***plus*** the choir's adoption of "The Lord Bless You And Keep You" as a "theme song"; or all of the same alleged facts ***minus*** the covert religious tour ***but plus*** the assignment of even more contemporary religious pop songs; or all of the same facts ***and also*** choir class being mandatory for all

students — *amici* would find themselves with conflicting obligations and responsibilities. They would be forced to predict the results of a lawsuit brought by a dissenting student, in the wake of unstable Tenth Circuit precedent clearly out of line with the Supreme Court precedent,[11/] while balancing (a) the need to protect students from harassment with (b) the need to ensure education is well-rounded and complete and (c) the need to protect the academic freedom of teachers and respond fairly to the requests of the community regarding curricular and extra-curricular decisions. How, in the wake of the *Bauchman* decision, could the *amici* effectively assess any of the three examples above?

Amici have specific responsibilities with respect to religious freedom and the church-state clauses. These include intervening in teacher-on-student or student-on-student coercive situations, maintaining a constant alert for proselytism, warding off conflict or strife on the basis of religious belief within the school (and within the community regarding the school), and maintaining a constant alert for harassment of and discrimination against students in a religious minority. *Amici* submit that ambiguities and fragmentation in the Court's Establishment Clause cases permit wildcard decisions like *Bauchman*, and leave school teachers and administrators without guidance in matters of religion. Reversal of the Tenth Circuit decision and clarification of the controlling Establishment Clause law are seriously needed.

[11/] The Tenth Circuit precedent is particularly unstable given the split panel and the subsequent evenly-divided vote on Petitioner's request for rehearing. *Amici* have little confidence that *Bauchman* lays out a reliable "rule of law" for even the Tenth Circuit.

CONCLUSION

The Court should grant the writ of certiorari because the case was decided wrongly, because the Court's Establishment Clause jurisprudence is in need of clarification if it is to provide guidance to the lower courts and to public school teachers and administrators, and because maintaining the wall of separation is vital in the public school system.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PRESBYTERIAN CHURCH (U.S.A.), *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petition for a Writ of Certiorari

Presbyterian Church (U.S.A.)
United Church Board for Homeland Ministries
of the United Church of Christ
The American Jewish Committee
Anti-Defamation League
General Conference of Seventh Day Adventists
Union of American Hebrew Congregations
Hadassah
Jewish Council for Public Affairs
Jewish Reconstructionist Federation
National Council of Jewish Women
National Organization for Women Foundation

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INTEREST OF *AMICI CURIAE*

Amici represent two broad assemblages of groups whose interests in this case are two sides of the same coin – mainstream church organizations and organizations whose mission is to oppose discrimination, including discrimination based upon religion.[1] Each

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1. The consents of the parties to the filing of this brief have been submitted contemporaneously to the Clerk of the Court. The *amici* have prepared this brief in support of Ms. Bauchman's Petition without the substantive or financial help of any party. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission (continued...)

amicus believes strongly in preserving religious freedom and in the Constitutionally mandated separation of church and state - especially in the field of public education. *Amici* support Rachel Bauchman's petition for a writ of certiorari because the Tenth Circuit has improperly construed this Court's precedents to be so muddled and unclear that they provide no meaningful guidance to the courts of appeals. As a result, the Tenth Circuit applied an *ad hoc* analysis that renders the Establishment Clause so amorphous as to undermine its efficacy. The Tenth Circuit's ruling presents a danger to mainstream religions wherever they find themselves a local minority, and a similar danger to minority groups everywhere. Individual statements of interest for each of the *amici curiae* are collected in an Appendix to this brief.

SUMMARY OF ARGUMENT

In *Wallace v. Jaffree*, Justice Powell warned that continued criticism of this Court's Establishment Clause jurisprudence "could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis." 472 U.S. 38, 63 (1985) (Powell, J., concurring). The Presbyterian Church (U.S.A.), the United Church Board for Homeland Ministries of the United Church of Christ, the American Jewish Committee, the Anti-Defamation League, the General Conference of Seventh-Day Adventists, the Union of American Hebrew Congregations, Hadassah, the Jewish Council for Public Affairs, the Jewish Reconstructionist Federation, the National Council of Jewish Women and the National Organization for Women Foundation, as *amici curiae*, urge this Court to grant Rachel Bauchman's petition for a writ of certiorari not only for the reasons set forth in Ms. Bauchman's petition, but also because the opinions of the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Utah have, as Justice Powell predicted, cast aside this Court's three-pronged Establishment Clause analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and

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1. (...continued)
of the brief.

replaced it with an *ad hoc*, "I know it when I see it," standard for assessing Ms. Bauchman's claims.

The Tenth Circuit Court of Appeals, in particular, openly expressed its disdain for this Court's Establishment Clause jurisprudence, which it called "muddled," "unworkable" and of "no useful guidance." *Bauchman v. West High School*, 132 F.2d 542, 551-52 (10th Cir. 1997). As a result, although the Tenth Circuit nominally structured its analysis around the "purpose," "effects" and "entanglement" prongs of the *Lemon* framework, its analysis under each prong departed dramatically from the manner in which this Court has applied that framework.

First, in applying the "purpose" prong of the *Lemon* analysis, the Tenth Circuit ignored numerous allegations that provided circumstantial support for Ms. Bauchman's claim that the Salt Lake City School District and one of its teachers had the actual purpose of favoring one religious belief over another. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989). Instead, the Tenth Circuit fashioned a new requirement that the purpose analysis must be supported by "concrete manifestations of intent" that are "temporally connected to the challenged activity." 132 F.3d at 560. That requirement is not supported by this Court's Establishment Clause cases, especially where the issue is the purpose of a teacher's improper conduct in public school classes attended by impressionable high school students. Moreover, the standard used by the Tenth Circuit provides would-be violators of the Establishment Clause with a virtual road map for committing such violations while avoiding any legal prohibition, simply by avoiding direct statements about the purpose of his or her actions at or around the time those actions occur.

Second, in applying the "effects" prong of the *Lemon* analysis, the Tenth Circuit did not assess whether the actions of school officials and Ms. Bauchman's teacher had the effect of advancing or inhibiting religion. In the past, this Court has used the effects analysis to assess activities that *seemingly* advance or inhibit religion, to determine

whether they may have "largely lost their religious significance over time," *County of Allegheny v. ACLU*, 492 U.S. at 631, or may be such that "a reasonable dissenter in this milieu could believe that the group exercise [did not] signif[y] her own participation or approval" of religion, *Lee v. Weisman*, 505 U.S. 577, 593 (1992). The Tenth Circuit, in contrast, applied an effects analysis that asked whether an observer steeped in local culture and history, and knowing that the Church of Jesus Christ of Latter Day Saints (the "LDS Church" or the "Mormons") comprised a majority of the local population, would be surprised by the alleged activities. This application of the effects standard virtually excludes consideration of minority interests from Establishment Clause analysis, instead giving prominence to the history, culture and context of a community's religious majority.

Third, in applying the "entanglement" prong of the *Lemon* analysis, the Tenth Circuit ignored Ms. Bauchman's allegations of religious strife resulting from the school's actions – allegations that, if proven at trial, would allow a fact-finder to determine that West High School has become excessively entangled with the community's religious institutions. *See Agostini v. Felton*, 117 S. Ct. 1997, 2015 (1997); *Lynch v. Donnelly*, 465 U.S. 668, 689 (1983) (O'Connor, J. concurring). The Tenth Circuit instead limited its "entanglement" analysis to "circumstances in which the state is involving itself with a recognized religious activity or institution." 132 F.3d at 556. This limitation allowed the Tenth Circuit to ignore Ms. Bauchman's allegations of religious strife and uphold the District Court's decision to deny Ms. Bauchman leave to amend her complaint.

The Tenth Circuit's truncated interpretation of each of the three prongs of this Court's *Lemon* framework departed from and significantly narrowed the application of this Court's Establishment Clause jurisprudence. The Tenth Circuit misused the complexities presented by this Court's Establishment Clause cases as license to conduct its own *ad hoc* analysis. *Lemon*, however, still provides the general principles that guide Establishment Clause analysis, *see Agostini v. Felton*, 117 S. Ct. at 2010, and remains this Court's only framework for assessing government action under the Establishment

Clause. Although that framework may have become somewhat "distorted" over the years, *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 721 (1994) (O'Connor, J., concurring in part and concurring in the judgment), the Tenth Circuit and the other Courts of Appeals should not be allowed to abandon the *Lemon* framework in favor of an amorphous, *ad hoc* assessment of government action. The Court should grant Ms. Bauchman's petition for a writ of certiorari to send a clear message to the Courts of Appeals and the District Courts that such *ad hoc* analyses are improper – especially where they result in a narrowing of Establishment Clause protection for students in the nation's primary and secondary schools. The posture of this case, arriving at this Court upon a denial of leave to amend that presents purely legal questions wholly divorced from any legitimate controversy over the facts alleged, provides a particularly appropriate opportunity for the Court to clarify the legal structure of a proper Establishment Clause analysis.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I.

THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S PURPOSE ANALYSIS, CONSTRUCTING ITS OWN, *AD HOC*, REQUIREMENTS FOR PLEADING AN IMPROPER PURPOSE UNDER THE ESTABLISHMENT CLAUSE.

In *Lemon v. Kurtzman*, this Court ruled that a government-sponsored program must have a secular purpose in order to be valid under the Establishment Clause. 403 U.S. at 612-13. Last Term the Court reaffirmed the "general principles" underlying *Lemon* and stated in particular that the Court "continue[s] to ask whether the government acted with the purpose of advancing or inhibiting religion." *Agostini v. Felton*, 117 S. Ct. at 1997. The Court reaffirmed that "the nature of [the purpose] inquiry has remained largely unchanged." *Id.*

In recent years, the Court has referred to the "actual" purpose of the government actors as the critical component of this analysis. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). "This secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is a 'sham.'" *Wallace v. Jaffree*, 472 U.S. at 64 (Powell, J., concurring); *accord Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) ("[A]n 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment.").

In the field of public education, this Court has expressed the need for particular vigilance so that "the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. at 584. The Court has characterized the need for vigilance in this area as part of the bond of trust between the families of public school students and the school system that provides family members with their education. *See id.* "That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Rachel Bauchman's complaints clearly allege actions that evidence a purpose by school authorities in Salt Lake City to advance the Mormon religion: Richard Torgerson, the teacher of Ms. Bauchman's Choir Class, engaged past Choir Classes in religious worship services, often at religious sites; had the Choir Class attended by Ms. Bauchman practice almost exclusively religious songs; and, in order to escape detection of what he knew was improper, sought to organize certain class members covertly in order to continue those past practices. [*See* Amended Complaint ("A.C.") ¶ 17(g); Complaint ("C.") ¶¶ 32, 34.] Torgerson allegedly advocated the Mormon religion in class, while stating he knew the law forbade him to do so. [*See* A.C. ¶ 16(h), (n), (o).] He asked his class to "accept"

the religious message of the songs he assigned. [*See id.* ¶ 16(l).] Torgerson also led the Choir Class in prayer and caused it to participate in religious services on a number of occasions. [*See id.* ¶ 16(e), (f), (k); *see also* C. ¶ 32.] All of these allegations support Ms. Bauchman's claim that Torgerson's purpose, and the purpose of the School officials who allowed him to continue these practices, was to promote religion in public high school classes.

In analyzing Ms. Bauchman's allegations, however, the Tenth Circuit cast aside all allegations related to prior conduct as irrelevant to the purpose inquiry and said the remaining allegations failed to satisfy the Tenth Circuit's newly-minted requirement of "objectively discernible conduct or communication that is temporally connected to the challenged activity and manifests a subjective intent by the defendant to favor religion or a particular religious belief." 132 F.3d at 560.[2] The Tenth Circuit could not cite any of this Court's cases – or any cases – that provided support for this new standard. In fact, the Tenth Circuit acknowledged that its purpose analysis did not even attempt to implement this Court's teachings on the subject:

> Having struggled to meaningfully apply the purpose component of the endorsement test to the alleged Establishment Clause violation in this case, we agree it is an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government

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2. In addition to applying the wrong legal standard, the Tenth Circuit also required Ms. Bauchman to plead her claims with a degree of specificity that this Court has said is not necessary to the assertion of a Constitutional or civil rights claim. *See Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting heightened pleading standard inconsistent with "notice pleading" standard of Fed. R. Civ. P. 8(a)); *see also Crawford-El v. Britton*, 66 U.S.L.W. 4311, 4316-17 (May 4, 1998) (rejecting heightened procedural standards for Constitutional claims that require proof of an improper purpose). Even if the Tenth Circuit had applied the proper substantive standards, their application of the wrong pleading standards alone would warrant the grant of Ms. Bauchman's petition.

> conduct goes against the grain of religious liberty the Establishment Clause is intended to protect.

132 F.3d at 552.

The Tenth Circuit's new standard casts aside the veil that separates the classroom from the sanctuary and instead openly grants public schools permission to advance religion, so long as the statements advancing religion are not accompanied by a contemporaneous and explicit admission that they are made for that purpose. Under the Tenth Circuit's standard, evidence that a purported secular purpose *was not* "sincere" or that it *was* a "sham," *see Wallace v. Jaffree*, 472 U.S. at 64 (Powell, J., concurring); *id.* at 75-76 (O'Connor, J., concurring), is irrelevant to the purpose inquiry, unless the evidence is contemporaneous with the government actions that allegedly supported religion. The Tenth Circuit's standard flouts this Court's rulings in a number of cases where government action was ruled unconstitutional, despite contemporaneous statements that the purpose of the action was secular. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. at 601 (nature and context of crèche overrode stated secular purpose of celebrating Christmas as a "national holiday"); *Edwards v. Aguillard*, 482 U.S. at 590-94 (Louisiana Legislature's stated purpose of promoting academic freedom in linking evolutionary theory and creationism was found unpersuasive, given history of religious purpose for similar prior enactments); *Wallace v. Jaffree*, 472 U.S. at 57-61 (legislative history confirmed religious purpose of statute requiring one minute for meditation or voluntary prayer); *Stone v. Graham*, 449 U.S. at 40-42 (Kentucky Legislature's "avowed" secular purpose for posting Ten Commandments in a public school was not sufficient to avoid conflict with Establishment Clause); *School Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963) (Court looked beyond stated secular purpose in scrutinizing Bible readings at the opening of the school day, considering, among other things, the manner in which the individual school administrators carried out the legislative mandate).

If it is allowed to stand without substantive review by this Court, the Tenth Circuit's ruling will have the insidious effect of permitting the advancement of religion in public schools in all but the most narrow of cases where government actors are brash enough to announce that their purpose is to promote religion. Apart from rendering the "purpose" analysis of *Lemon* a virtual nullity, the Tenth Circuit's analysis provides a road map for public school teachers to convert their lectern into a pulpit, so long as they do not simultaneously admit that their purpose is to promote or endorse religion. Such an analysis cannot be consistent with this Court's precedents or, indeed, with the very provisions and historical underpinnings of the Establishment Clause itself.

II.

THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S EFFECTS ANALYSIS, CONSTRUCTING ITS OWN, *AD HOC*, REQUIREMENTS FOR PLEADING AN IMPERMISSIBLE EFFECT UNDER THE ESTABLISHMENT CLAUSE.

In determining whether government action has the effect of advancing or inhibiting religion, *see Lemon v. Kurtzman*, 403 U.S. at 612, this Court has several times asked whether a "reasonable observer . . . aware of the history and context of the community and forum," would conclude that "a challenged governmental practice conveys a message of endorsement of religion," *County of Allegheny v. ACLU*, 492 U.S. at 630; *accord Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2455-56 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

The "reasonable observer" test asks whether a person having the general characteristics of the plaintiff and an appropriate awareness of history and context would see the challenged practices as having the effect of establishing either a particular religion or religion in general. In particular, the Court has used the "reasonable observer" test to ask whether practices that seem at first glance to endorse religion, do not do so because a reasonable observer would

conclude that they "have largely lost their religious significance over time." *County of Allegheny v. ACLU*, 492 U.S. at 631 (holding that a lone crèche at Christmas in a courthouse had *not* lost its religious significance). Furthermore, in examining the perceptions of school-age children as to whether a particular practice constituted an establishment of religion, the Court has looked to whether, "given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

As with the purpose prong, this Court has shown particular sensitivity to the impressionable nature of school-age children. "There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. at 592; *accord School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985) ("The government's activities in this area can have a magnified impact on impressionable young minds . . . .").

Ms. Bauchman's complaints allege that her public high school teacher, with the acquiescence of school authorities, sought to limit the choir class to Mormon students, [*see* A.C. ¶ 16(d)]; sought to restrict class tours to Mormon students, [*see* A.C. ¶ 17(g); C. ¶ 34]; prayed with and over students, [*see* A.C. ¶ 16(k)]; forced students to attend Mormon worship services, [*see* A. C. ¶ 16(b); C. ¶¶ 23-26, 32]; belittled religious minorities, [*see* A. C. ¶ 17(i), (k)]; used the religious content of assigned songs to preach Mormonism, [*see* A.C. ¶ 16(g); C. ¶ 19]; stated his intention to continue such advocacy despite knowing he was violating the Constitutional rights of class members, [A.C. ¶ 16(o)]; and sought to isolate minority students from class participation, rather than accommodating them [*see* A.C. ¶ 17(e)].

The Court of Appeals ruled that this conduct did not have the effect of endorsing the Mormon religion, because "a reasonable observer aware of the purpose, context and history of public education in Salt Lake City, including the historical tension between the

government and the Mormon Church," would not conclude that the alleged actions had "a principle or primary effect of endorsing religion." 132 F.3d at 555-56. According to this analysis, a "reasonable observer" might (*i*) examine the history and context of a community's dominant religion, (*ii*) decide how much of that religion he or she could reasonably expect to seep into civic and governmental matters, and (*iii*) test the challenged practice against that threshold expectation.

The Tenth Circuit's analysis turns the *Lemon* test's effects prong on its head by taking a small piece of this Court's reasonable observer analysis (awareness of history and context) and allowing it to become the analysis itself. While the Tenth Circuit's allusions to the "unique history" of the Mormon religion in the "community, culture and heritage" are somewhat opaque, the Court of Appeals appears to have converted an awareness of history that would be reasonable for an observer standing in Ms. Bauchman's shoes into a perspective so sweeping as to permit a dominant religion to dominate every aspect of the community, including the public elementary and secondary schools. The Tenth Circuit did not attempt to analyze whether the religious songs that the choir allegedly sings, the religious venues at which it allegedly performs, or the Mormon prayers their teacher allegedly recited had "lost their religious significance over time." *County of Allegheny v. ACLU*, 492 U.S. at 631. Nor did it attempt to determine whether the singing of religious songs at religious venues would be interpreted by a reasonable observer as something other than *government* endorsement of religion. *See Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. at 2456 (O'Connor, J. concurring in part and concurring in the judgment) (finding that a Christian cross placed by a private organization in a state-owned square would not strike a reasonable observer as *government* endorsement, because of the square's history as a forum for *private* expression). Utterly absent from the Tenth Circuit's analysis is any vestige of asking what the effects on a school-age child would be of the overt government action in a government-controlled forum like the school in this case.

In stark contrast with the Tenth Circuit's analysis, this Court's "reasonable observer" has never found conduct that is overtly religious and plainly government-sponsored to be permissible simply because it is consistent with the "community's culture and heritage." In fact, the Court has said just the opposite. *See County of Allegheny v. ACLU*, 492 U.S. at 603 ("[H]istory cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."); *see also id.* at 630 (O'Connor, J., concurring in part and concurring in the judgment) (reasonable observer is not required to suffer or forgive a government-endorsed religious practice "by virtue of [its] historical longevity alone"). The approach adopted by the Tenth Circuit in this case potentially exempts any action that the community has come to expect because of a particular religion's historical dominance of local culture and heritage. As a result, it requires "any given . . . observer's individual experiences and spiritual beliefs" to yield to "the community's [religious and nonreligious] culture and heritage." 132 F.3d at 555.

The potential effect of the Tenth Circuit's analysis is truly devastating. It could require religious minorities everywhere to defer to state endorsement of majority religious practices where that endorsement historically has gone unchallenged. Furthermore, it would allow a majority religion a certain leeway in public affairs wherever it could demonstrate "historical" roots in a "community's culture and heritage" and "historical tension" between itself and the government. *See id.* A "reasonable observer," for instance, aware of the history of the Quakers in southeastern Pennsylvania, would expect a certain amount of Quaker religious doctrine to invade the public schools there. Judaism would be allowed to dominate public education in certain parts of Brooklyn, while Baptists would hold sway in Rhode Island, Southern Baptists in Arkansas, Catholics in New Orleans, and Mennonites in the Upper Shenandoah Valley. Maryland schools would demonstrate a Catholic heritage while Methodists would rule in Ohio and Lutherans in parts of Minnesota. The country would Balkanize along majority-religious lines and minority children would have no choice but to be inculcated in the majority religion wherever they went to school.

This Court has never condoned using the "reasonable observer" analysis to allow state promotion of religion simply because the religion has been historically dominant and the promotion has gone historically unchallenged. Yet, uncertainty as to the role of history in Establishment Clause jurisprudence has led to inconsistent rules of decision, even within individual federal circuits. *Compare American Civil Liberties Union of New Jersey v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1486 (3d Cir. 1996) ("history and ubiquity" are relevant to the context in which a reasonable observer evaluates a possible endorsement of religion) *with American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435, 1448 (3d Cir. 1997) (declining to impute a sense of a community's history to a reasonable observer). Certiorari should therefore be granted to determine the scope and manner of accounting for "history and context" in Establishment Clause analysis. Failure to address this important question would be to abandon this Court's specific "reasonable observer" standard and to replace it with an utterly amorphous and uncertain case-by-case accommodation of "history and context."

III.

THE TENTH CIRCUIT DEPARTED FROM THIS COURT'S ENTANGLEMENT ANALYSIS, CONSTRUCTING ITS OWN, *AD HOC*, REQUIREMENTS FOR PLEADING AN EXCESSIVE ENTANGLEMENT UNDER THE ESTABLISHMENT CLAUSE.

In determining whether state action excessively entangles government with religion, this Court historically has analyzed whether political or other conflict along religious lines has arisen in connection with the complained-of action. *See Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 795-96 (1973); *Lemon v. Kurtzman*, 403 U.S. at 622. More recently, the Court has limited its analysis to the relationship between government and religious institutions. *See Agostini v. Felton*, 117 S. Ct. at 2015. In this context, political or other conflict constitutes evidence of governmental entanglement with religious institutions. *See Lynch v. Donnelly*, 465 U.S. at 689 (O'Connor, J., concurring).

In her complaints, Ms. Bauchman has alleged numerous examples of the kind of inter-faith strife, resulting from the actions of school authorities, that provides evidence that the school system has become overly identified and entangled with particular religious institutions. For instance, many students besides Ms. Bauchman complained of the Choir's participation in religious services, [*see* A.C. ¶ 16(o)]; Torgerson excluded dissenting students, including Ms. Bauchman, from a covert Special Tour he tried to assemble, [*see* A.C.¶ 17(g)-(h); C., ¶ 47], and attempted to "limit the Choir Class to members of [the LDS Church]," [A.C. ¶ 16(d); *see also* C. ¶ 47]. In a Choir Class lecture, Torgerson "directed the attention of the Choir Class to the fact that Rachel is a Jew" and encouraged her "ridicule and ostracism" by fellow students. [A.C. ¶ 17(k); *see also* C.¶ 36.] Most egregiously, Torgerson initiated a campaign among parents and students to "punish and ostracize those who disagreed with his advocacy of religion." [A.C. ¶ 17(d); *see also* C. ¶¶ 39-42.] As described by the district court,

> Upon receipt of a letter from plaintiff's father, Eric Bauchman, detailing plaintiff's constitutional claims, Torgerson forwarded the letter to Preston Naylor, the father of another member of the choir. Torgerson's purpose in forwarding the letter was to assist Mr. Naylor in publicizing the letter and the Bauchman's views, allegedly to engender hostility against plaintiff. The private letter from Mr. Bauchman was, in fact, publicly distributed as an attachment to a letter from Mr. Naylor to choir students' parents that criticized plaintiff and her parents for asserting plaintiff's constitutional claims. Plaintiff asserts that distribution of Mr. Bauchman's letter resulted in her being subjected to public humiliation and hostility.

Bauchman v. West High School, 900 F. Supp. 254, 261 (D. Utah 1996). Bauchman's complaints also alleged her subjection to explicit religious epithets from other students, such as "Jew bitch." [A.C. ¶ 37; *see* C. ¶¶ 36-52.] The divisiveness culminated at Bauchman's high school graduation ceremony when, notwithstanding an order from the Tenth Circuit enjoining performance of a particular religious

song, and as school teachers and administrators sat by, the song was performed by members of the choir and the audience, as Bauchman left the auditorium in tears. *See* 900 F. Supp. at 262.

This degree of civil strife certainly provides ample evidence that Mr. Torgerson, with the acquiescence of school officials, allowed his high school lectern to become a pulpit from which to promote the religious institutions in which he believes. Such proselytizing in a public school, if left unchecked, inevitably leads to an excessive entanglement of the school and the religious institutions being promoted by the teacher. If Ms. Bauchman were allowed to prove her allegations at trial, a reasonable fact-finder surely could find excessive government entanglement.

In its truncated "entanglement" analysis, however, the Tenth Circuit limited its examination "to circumstances in which the state is involving itself with a recognized religious activity or institution." 132 F.3d at 556. It then decided that having a public school class participate in Mormon worship services, "alone" and "without more" did not amount to government entanglement, *see id.*, ignoring that these activities were not alleged to have occurred "alone" and "without more," but amidst many other subtle and coercive uses of state power by Mr. Torgerson. More significantly, the Tenth Circuit completely ignored Ms. Bauchman's allegations of resulting civil strife – the key circumstantial evidence of excessive entanglement in this case.

The Tenth Circuit's overly narrow analysis ignored the effect on minorities that excess government entanglement in religion carries with it. In case after case, confronted with government entanglement in a majority religion, minority students like Ms. Bauchman are faced with an unconstitutional choice: they may acquiesce in silence, as the children did in *School District of Abington Twp. v. Schempp*, 374 U.S. at 208 n.3 (children did not ask to be excused from daily prayers in public school for fear of being "labeled as 'odd balls'" or forced to stand in the hallway during prayers, which "carried with it the imputation of punishment for bad conduct" (internal quotation marks

omitted)), or they may speak up, as Ms. Bauchman did, and suffer, with the acquiescence of school authorities, opprobrium, ridicule, insults, slurs, oppression and exclusion. This is precisely the dilemma from which this Court's Establishment Clause jurisprudence seeks to protect schoolchildren. *See Lee v. Weisman*, 505 U.S. at 593-95 (public schools may not "require[] participation in a religious exercise" that "place objectors in the dilemma of participating . . . or protesting").

Justice Blackmun, concurring in *Lee*, summarized the potential impact on students and others of excess government entanglement in religion:

> When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.

Id. at 606-607 (1992) (footnotes and citations omitted); *see also Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring) (government "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community").

The Tenth Circuit, however, ignored the dilemma facing high school students who are members of a religious minority and fashioned its own, narrow entanglement analysis in which the only question is whether West High School or its choir had directly involved themselves in religious institutions. As a result, the Tenth Circuit ignored Ms. Bauchman's allegations of strife and division along religious lines within the school community. Short of legislation specifically adopting a state religion, one must wonder what, if anything, a potential plaintiff could allege that would meet the Tenth Circuit's extraordinary requirements.

CONCLUSION

Like other areas of Constitutional analysis, the Establishment Clause gives rise to complex standards that must be applied by the lower courts. Faced with such complexities, courts must not be allowed simply to throw their hands in the air, declare the jurisprudence confused and then apply their own *ad hoc* analyses. Ms. Bauchman, as a member of a religious minority in Salt Lake City, deserves a more thorough analysis, and the protection of the Constitutional liberties of all of us demands that courts do the work necessary to apply those complex standards in all cases. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX:

STATEMENTS OF INTEREST OF INDIVIDUAL *AMICI*

Presbyterian Church (U.S.A.)

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

The Presbyterian Church (U.S.A.) and its predecessor denominations have a long and rich tradition of supporting the separation of Church and State required by the Establishment Clause of the First Amendment to the Constitution. In keeping with that tradition, the 200th General Assembly, in 1988, suggested that conflict was inevitable when a school promoted one religious position because "[s]tudents holding minority views are bound to be offended when the government adopts one . . . without reference to other views."

United Church Board for Homeland Ministries of the United Church of Christ

The United Church Board for Homeland Ministries is responsible for the prophetic mission of the United Church of Christ within the United States and Puerto Rico. The United Church Board for Homeland Ministries is one of the denomination's mission boards with deep commitments to the integrity of education and public life. The

United Church of Christ, whose headquarters are in Cleveland, Ohio, includes over 6,000 member congregations and one and a half million members.

The American Jewish Committee

The American Jewish Committee ("AJC"), a national organization founded in 1906, is dedicated to the defense of the religious rights and freedoms of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society. In support of this vital principle, AJC through the years has filed numerous briefs in this Court. We do so again in the conviction that religious observances of any kind do not belong in public schools.

Anti-Defamation League

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to the free exercise of religion. In support of this principle, ADL has previously filed amicus briefs in numerous court cases at the federal level. ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

General Conference of Seventh-day Adventists

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 40,000 congregations with more than 8.6 million members worldwide. The North American Division of the General Conference administers the work of the church in the United States,

Canada, and Bermuda and represents more than 4,200 congregations in the United States with nearly 800,000 members, including approximately 260 congregations and some 26,000 members in the states of Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico. The Seventh-day Adventist Church has strongly supported the twin concepts of free exercise of religion and the separation of church and state since its founding in 1863 and actively promotes those ideals through its bimonthly *Liberty* magazine. The working policy in North America points out the church's teaching "that religious liberty is best achieved, guaranteed and preserved when church and government respect each other's proper areas of activity and concern."

Union of American Hebrew Congregations

The Union of American Hebrew Congregations ("UAHC") represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has participated as *amicus* in a wide array of religious liberty cases, often before the United States Supreme Court. Recent Supreme Court *amicus* participation includes *Board of Education of the Kiryas Joel Village School District v. Louis Grumet* (1993) and *City of Boerne, Texas v. P.F. Flores, Archbishop* (1997).

Hadassah

Hadassah, the Women's Zionist Organization of America, with over 300,000 members nationwide, is both the largest women's and the largest Jewish membership organization in the country. Hadassah has long been committed to the protection of a strict separation of church and state as guaranteed by the Establishment Clause of the First Amendment of the U.S. Constitution.

For example, in 1981, Hadassah made the following statement: "Hadassah, the Women's Zionist Organization of America, notes that

the First Amendment to the Constitution set up the wall of separation between church and state which has served as a guarantee for religious freedom and diversity in the United States, including that of the Jewish community." And in 1994, Hadassah further stated: "Hadassah, the Women's Zionist Organization of America, firmly believes that the First Amendment clearly prohibits any government entity, including public schools, from fostering religious practices and/or beliefs."

Throughout the years, Hadassah has passed numerous similar statements reaffirming our steadfast commitment to the separation of church and state.

Jewish Council for Public Affairs

The Jewish Council for Public Affairs ("JCPA"), formerly the National Jewish Community Relations Advisory Council, is an umbrella organization of 13 national and 122 local Jewish public affairs and community relations agencies across the United States, including the Anti-Defamation League, American Jewish Congress, American Jewish Committee, the Union of American Hebrew Congregations, the Union of Orthodox Jewish Congregations of America, and the United Synagogue of Conservative Judaism. The Union of Orthodox Jewish Congregations of America and the Jewish Community Relations Council of New York abstain from joining this brief.

Founded in 1944, the JCPA has long been devoted to preserving the essential principles embodied in the Bill of Rights, particularly the First Amendment guarantee of separation of church and state. The JCPA believes that the Establishment Clause is an essential bulwark in protecting the religious freedom of all Americans, and has therefore joined *amicus curiae* briefs in a number of other seminal church-state cases before this Court.

Jewish Reconstructionist Federation

The Jewish Reconstructionist Federation ("JRF") is signing on to this brief as an *amicus curiae*. We are a federation of over 90 congregations in the United States. We are committed to the religious rights and freedoms of all Americans. We believe that the separation of church and state is the best way to realize these freedoms. We believe that the religious freedom of every individual has helped to make this the most pluralist and freest nation on earth. We want to protect this heritage.

National Council of Jewish Women

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's *National Principles*, which state, "Religious liberty and the separation of religion and state are constitutional principles which must be protected and preserved in our democratic society," we join this brief.

National Organization for Women Foundation

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education, advocacy and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a membership of over 200,000 women and men in more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to end discrimination in all of its forms, including discrimination based on religion. We have a strong interest in maintaining the constitutional separation of church and state, and in protecting the rights of minority populations.

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No. 97-1764

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

SCHOOL DISTRICT RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a motion to amend an Establishment Clause claim is properly deemed futile when the proposed claim that a choir teacher chose songs and performance venues for the purpose of promoting religion is supported solely by an inference of an unexpressed motivation to promote religion based on the teacher's alleged past conduct and religious character.

2. In considering a motion to amend a complaint, whether proposed allegations may properly be disregarded as speculative, conclusory, or unsupported by the record evidence proffered in support of the allegations.

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No. 97-1764

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SCHOOL DISTRICT RESPONDENTS' BRIEF IN OPPOSITION

Respondents Salt Lake City School District, William Boston, Gene Bonella, Teresa Piele, Dolores Riley, Darline Robles, Dale Manning, and Mary Jo Rasmussen (the "School District") respectfully request this Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

As a sophomore at West High School in Salt Lake City during the 1994-95 school year, Rachel Bauchman attended an a capella choir class taught by Richard Torgerson. At the end of the school year, Bauchman brought this suit against Torgerson and the School District. Bauchman alleged that Torgerson had violated the Establishment Clause by including songs containing religious lyrics in the choir class curriculum and by holding some choir performances at churches and church-owned venues. Although Bauchman initially sought injunctive and declaratory relief in addition to damages, all but her damages claim became moot when Bauchman graduated from high school one year ago.

In motions to dismiss the complaint, Torgerson and the School District contended: (1) that Bauchman had failed to state a valid Establishment Clause claim because both the songs and the venues served clearly secular educational purposes, particularly given the predominance of religious songs in choral music and the suitability of churches for public choral performances; (2) the individual defendants were entitled to qualified immunity from Bauchman's damages claim because no clearly established law existed to alert them that the alleged conduct violated the Establishment Clause; and (3) Bauchman had failed to allege sufficient facts to establish supervisory liability against the School District.

Although Bauchman responded to the motions to dismiss and filed a supplemental pleading concerning the high school's graduation exercises while the motions were pending, she elected not to amend her complaint to include any allegation that Torgerson selected songs and performance

venues with the purpose or intent of advancing religion. The district court dismissed Bauchman's complaint on all three grounds raised in the motions.

After the district court had entered its final judgment of dismissal, Bauchman finally moved, through a motion to amend the judgment, for leave to file a proposed amended complaint. Unlike the original complaint, the proposed amended complaint alleged for the first time that Torgerson had selected the songs and venues for the purpose of promoting religion.

Although it considered Bauchman's motion to amend untimely given her opportunity to amend before the dismissal of her complaint, the district court withheld ruling on the motion to amend while the parties conducted extensive discovery on Torgerson's allegedly religious purpose in selecting the songs and venues. The district court limited discovery to conduct and events occurring during the 1994-95 school year when Bauchman was a choir member, unless Bauchman could show a "clear and concise nexus" between Torgerson's alleged past conduct and Bauchman's alleged injury in 1994-95.

Following discovery, Bauchman filed a renewed motion to amend. Rather than revising her proposed amended complaint, Bauchman proffered affidavits, deposition testimony, and other evidence in support of her renewed motion. The thrust of the proffered allegations and evidence was that before the 1994-95 school year, Torgerson had engaged in conduct beyond the mere selection of songs and venues, such as having the choir perform at religious worship services, for the purpose of advancing religion. Considering the allegations of the proposed amended complaint as supported by

the record evidence, the district court denied Bauchman leave to amend, reasoning that: (1) the proposed amendment was untimely, A106-107; and (2) the proposed amendment would be futile because under the objective reasonable observer standard established by the endorsement test for Establishment Clause violations, Torgerson's subjective intent in selecting the songs and venues during the 1994-95 school year was irrelevant. A86-87.

The court of appeals affirmed the district court's decision that the motion to amend was futile based on three grounds: (1) the presence of a religious purpose alone does not satisfy the "actual" purpose component of the endorsement test, and Bauchman never alleged the lack of any clearly secular purpose as required; (2) Bauchman's standing is limited to any infringement of her rights while she was a choir member and a plaintiff may not bootstrap her constitutional claims based on alleged past violations suffered by nonparties; and (3) the "actual" purpose component of the endorsement test must be satisfied by "objectively discernible conduct or communication that is temporally connected to the challenged activity and manifests a subjective intent to favor religion or a particular religious belief." A38-40.

In affirming the district court's judgment, the court of appeals did not reach the issues of: (1) whether the district court properly denied leave to amend because the motion was untimely, (2) whether the individual defendants were qualifiedly immune from Bauchman's damages claims, or (3) whether Bauchman failed to allege sufficient facts to establish supervisory liability against the School District.

REASONS TO DENY THE PETITION

I

THE ISSUES PRESENTED ARISE IN A CONVOLUTED SUBSTANTIVE AND PROCEDURAL CONTEXT IN A CASE THAT IS LARGELY MOOT

The issues presented arise within a convoluted substantive and procedural posture that counsels against their consideration by this Court. The procedural context weighs against such consideration because the issues presented involve only proposed allegations that were never placed directly in issue below. Furthermore, the issues presented have little, if any, practical significance because Bauchman's claims are largely moot and several alternative grounds exist for dismissal of her remaining claim in damages. The substantive context of the questions presented also supports denial of the Petition because the decision below rested on two independent grounds not encompassed by the issues presented, and because Bauchman has misconstrued both the breadth and basis of the Tenth Circuit's decision.

Bauchman's allegations concerning the choir teacher's purpose in selecting songs and venues, which are the focus of the issues presented, were never placed directly in issue below. Rather, those allegations were presented only in the context of Bauchman's motion to amend the complaint. Contrary to Bauchman's incorrect assertion that this case was decided at the "pleading stage," the motion to amend was filed only after the district court had already entered a final judgment dismissing Bauchman's entire complaint. Moreover, in addition to ruling

that Bauchman's proposed amended complaint was futile, the district court rejected Bauchman's motion as untimely.

Accordingly, contrary to Bauchman's contention that this case presents the question of the standard of proof of a religious purpose "in as clear a fashion as possible," it is difficult to imagine a more convoluted procedural posture for review of the issues presented. Rather than reviewing a clear and well-defined legal question under a de novo standard of review, the Tenth Circuit reviewed the district court's decision under an abuse of discretion standard. The same abuse of discretion standard would apply to the questions presented on certiorari review.

In addition to arising in the context of an abuse of discretion review, the questions presented have little practical significance, if any. As the Tenth Circuit determined, Bauchman's claims for injunctive and declaratory relief are moot because Bauchman graduated from high school one year ago. That determination of mootness is not fairly subsumed by either of the questions presented by the Petition and is therefore conclusive.

Bauchman's proposed claim in damages also lacks practical significance because it would be subject to dismissal on several alternative grounds not raised by the Petition. In addition to determining that her motion to amend was untimely, the district court also held that (1) the individual defendants were immune from Bauchman's proposed damages claims under the doctrine of qualified immunity, and that (2) Bauchman's allegations were insufficient to establish supervisory liability against the School District. All of these

alternative grounds were argued to the Tenth Circuit and therefore remain at issue in the case.

The substantive context of the questions presented also supports denial of the Petition. Although the Tenth Circuit articulated three independent grounds for its ruling that Bauchman's allegations concerning the choir teacher's past conduct were irrelevant under the purpose prong of the Establishment Clause test, the Petition addresses only the third stated ground. In addressing the relevance of Bauchman's proposed new allegations, the Tenth Circuit stated:

> Ms. Bauchman's allegations regarding Mr. Torgerson's past conduct are irrelevant to her Establishment Clause claim *for three reasons*. First, as previously discussed, the "actual" purpose component of the endorsement analysis begins by asking whether there is a lack of a clearly secular purpose, not whether there is any religious purpose present . . . . As previously discussed, *Ms. Bauchman never alleged the defendants lacked a secular purpose*.

A38 (emphasis added). Second, the Tenth Circuit ruled that

> [Ms. Bauchman's] standing to sue . . . is limited to claims related to the infringement of her own constitutional rights while she was a Choir member. Accordingly, the allegations and evidence relevant to Ms. Bauchman's claims are limited to defendants' conduct and events during the 1994-95 school year. *The district court did*

not abuse its discretion by so limiting discovery and its analysis of Ms. Bauchman's claims.

A38-39 (emphasis added). Only then did the Tenth Circuit turn to the reasoning challenged by the Petition, holding that allegations of unexpressed psychological motives inferred from alleged past conduct are insufficient to show a religious purpose. A39-40.

Moreover, in attacking the Tenth Circuit's third rationale, Bauchman has overstated the breadth of the court's holding. First, in suggesting that the court went so far as to exclude all "circumstantial and historical evidence" and to require an "express and contemporaneous admission" of a religious purpose, Bauchman inflates the court's actual requirement of "objectively discernible conduct or communication that is temporally connected to the challenged activity." A39.

Second, nothing in the Tenth Circuit's opinion suggests that it may properly be read without regard to the facts of this particular case, as Bauchman suggests. To the contrary, the court's ruling that Bauchman's allegations were irrelevant may legitimately be interpreted *only* in light of the specific alleged facts. None of those alleged facts was necessarily inconsistent with a primarily secular motivation for the choir teacher's selection of songs and venues. Other than the selection of songs and venues, none of the alleged conduct extended into the 1994-95 school year. Just as tellingly, none post-dated the School District's April 1994 directive advising the choir teacher that "you, as a faculty member at West High, cannot initiate or encourage religious exercises of any kind while representing the school" and that "you cannot arrange for or encourage students

to participate in religious exercises of any kind while representing the school." TCA 811. Nor did any post-date the choir teacher's public apology and pledge "that I [will] never again as an agent of the school offer a prayer in the [students'] presence or involve them in a worship service of any kind." TCA 582-83.

Indeed, most of the alleged conduct pre-dated this Court's watershed Establishment Clause decision in *Lee v. Weisman*, 505 U.S. 577 (1992), and the enactment in 1993 of Utah's Recognizing Constitutional Freedoms in the Schools Act, which expressly prohibits the promotion of religion in the public schools, including school choir performances as part of a religious worship service. *See* Utah Code Ann. § 53A-13-101(6) and -101.1 (1993); Utah Admin. Code R277-105-7C(1).

Thus, in requiring "objectively discernible conduct or communication that is temporally connected" to the challenged conduct, the Tenth Circuit recognized that Bauchman's allegations lacked any probative value to show that the choir teacher's primary motivation for the challenged conduct was not secular.[1]

---

[1]Bauchman further misconstrues the Tenth Circuit's decision in suggesting that the court inappropriately weighed the evidence or determined "not to believe" her allegations. To the contrary, the court obviously rejected many of Bauchman's characterizations of the record as inaccurate, as did the district court. *See* A89 ("Some of [Bauchman's] claims are speculative or conclusory; others are unsupported or at odds with an objective review of evidence developed in discovery."). Bauchman continues to overstate the record in the Petition. For example, Bauchman's assertion that

II

THE DECISION BELOW PRESENTS NO DIRECT OR INDIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The four circuit court decisions cited by Bauchman as conflicting with the Tenth Circuit decision in this case are readily harmonized with the Tenth Circuit decision. Unlike this case, none of the purportedly conflicting decisions presented an Establishment Clause issue in a procedural context that invoked an abuse of discretion standard of review. The Third, Fifth and Eleventh Circuit decisions are also inapposite because they all addressed the explicitly religious exercise of prayer. Rather than conflicting with the decision below, the Eighth Circuit case was relied upon by both the district court and the Tenth Circuit to *support* their rulings that including songs with religious lyrics in a choir class curriculum and holding some choir performances at churches and church-owned venues comports with the Establishment Clause.

Torgerson "used class time and public school facilities" to organize a trip in 1994-95 finds no record support. TAC 735A. Similarly, her allegation that the "three Jewish students in the class, including Rachel, were not invited to participate" in the tour is directly contravened by the testimony of one of the Jewish students that she had been contacted about the tour but had chosen not to go. District's Supplemental Appendix 161, Tenth Circuit No. 96-4101. Furthermore, the Tenth Circuit correctly rejected Bauchman's argument that the district court improperly granted summary judgment against her as "without merit" and "disingenuous." A42.

The Third, Fifth and Eleventh Circuit decisions all addressed state statutes or school board policies permitting prayer at school functions. *See American Civil Liberties Union v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (invalidating school board policy allowing graduation prayer upon vote of students); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (invalidating statutory provision allowing student-requested prayer at all school functions, but upholding provision allowing graduation prayer based on student vote); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 826 (11th Cir. 1989) (invalidating school board policy permitting invocations before football games).

Unlike Bauchman's proposed claim, none of these allegedly conflicting decisions rested solely on the purpose prong of the Establishment Clause test. Moreover, the explicitly religious nature of the challenged conduct largely obviated the need to consider any indirect or circumstantial evidence of subjective intent. To the extent that these decisions relied upon such evidence, the evidence merely buttressed the already strong showing of a religious purpose based on inherent nature of the challenged conduct.

Thus, in *Black Horse*, the Third Circuit focused upon the fact that the school board's "avowed purpose" (not its unexpressed psychological motivation as revealed by past conduct) was to preserve the longstanding tradition of prayer, that "[p]rayer is, of course, religious speech," and that the policy permitted students to give a "sectarian, proselytizing address." *See* 84 F.3d at 1480, 1484. The court also rejected the school district's claimed purpose of advancing free speech, noting the school's continuing control over the graduation forum. *Id.* at 1484.

Similarly, in *Ingebretsen*, the Fifth Circuit's conclusion that a state statute allowing "student-initiated" prayer at school functions violated the purpose prong was based primarily on the statute itself. The court reasoned that the legislature's declared purpose of advancing free speech "cannot be characterized as secular" because the "clear intent" of the statute was "to inform students, teachers, and school administrators that they can pray at any school event so long as a student 'initiates' the prayer," 88 F.3d at 279. The court noted that the statute allowed school officials to lead students in prayer and "set[] aside special time for prayer that it did not set aside for anything else." *Id.* at 280.

The court further relied on the legislature's "resolution commending [the principal] for his unswerving dedication to prayer in the public schools," *id.* at 279, and the public "uproar" over the treatment of the principal that directly prompted the enactment of the challenged statute, *id.* at 277, 279, to reach the "unavoidable" conclusion that the statute was intended to promote religion. *Id.* at 279.

In the same vein, in *Jager*, the Eleventh Circuit noted that the school board had chosen "religious invocations, which by definition serve religious purposes," although the asserted secular purposes of solemnizing football games and instilling values of fair play could be equally served by "wholly secular inspirational speeches." 84 F.3d at 1484. Furthermore, the court concluded that "an intrinsically religious practice, *cannot* meet the secular purpose prong of the Lemon test . . . ." *Id.* at 830 (emphasis added).

Bauchman inaccurately asserts that the school officials in *Jager* "insist[ed] that their actions were 'wholly secular from start to finish.'" Petition at 16 (citing 862 F.2d at 829 n.11). As

an examination of note 11 demonstrates, the phrase "wholly secular" refers to the "football program," and is immediately preceded by an admission that the invocations, "have no secular purpose whatsoever." *See* 862 F.2d at 829 n.11. Contrary to Bauchman's conclusion that the court made no reference to express, contemporaneous statements evincing a religious purpose, the court found that the admission "reinforces our conclusion that the actual purpose behind both the equal access plan and the prior invocation practice was to endorse Protestant Christianity." *Id.* at 829-30 n.11.

Indeed, the Tenth Circuit also noted the obvious analytical distinction that Bauchman ignores between intrinsically religious activity such as prayer and the selection of religious songs and performance venues in the context of a choir class--conduct that is entirely consistent with a primarily secular educational purpose:

> Although the [Supreme] Court has indicated a failure to satisfy the purpose component of the endorsement test alone is sufficient to invalidate government action, the Court rarely has decided cases based solely on the purpose component. When it has, *the overriding religious purpose of the government action has been obvious, leaving little need to elaborate on the appropriate scope of the purpose inquiry.*

A20 (emphasis added).

Nor can the Eighth Circuit's reasoning in *Florey v. Sioux Falls School District*, 629 F.2d 1311 (8th Cir. 1980), be stretched to even tangentially conflict with the Tenth Circuit's

decision in this case. Given its decision upholding the school board's policy of permitting observance of holidays having both a religious and secular basis, the court's statement that "religious ceremonies can [not] be performed under the guise of 'study'" may not reasonably be interpreted as suggesting a need to examine remote and indirect evidence of intent to determine the actual religious purpose behind such study. To the contrary, as in the case of prayer, the religious purpose behind such a ceremony would be obvious.

III

CRAWFORD-EL DOES NOT UNDERMINE THE DECISION BELOW, WHICH IS BASED UPON POLICY CONSIDERATIONS UNIQUE TO ESTABLISHMENT CLAUSE CLAIMS

This Court's narrow 5-4 decision in *Crawford-El* provides no basis for granting the Petition or remanding this case for reconsideration by the Tenth Circuit because *Crawford-El* examined policy considerations entirely distinct from those involved in this case. *See Crawford-El v. Britton*, No. 96-827, 1998 WL 213193 (US May 4, 1998). In *Crawford-El*, the D.C. circuit had fashioned a broad rule requiring clear and convincing evidence to support *all* motive-based constitutional torts. The proposed rule was grounded in the policies behind the doctrine of qualified immunity, its sole purpose being to encourage early disposition of insubstantial claims. This Court found no support for the rule in the text of § 1983, any other federal statute, or the Federal Rules of Civil Procedure.

Unlike *Crawford-El*, the Tenth Circuit's decision in this case is based solely on policy considerations unique to Establishment Clause claims and not on any desire to encourage early disposition of such claims. In addition, unlike the broad, clear and convincing evidence rule rejected in *Crawford-El*, the Tenth Circuit's requirement of objectively discernible and temporally connected evidence of religious purpose is limited by both the procedural posture and the specific factual allegations of this case, as discussed in Point I above. Finally, the Tenth Circuit's decision is clearly inapplicable to motive-based torts founded on other constitutional provisions, and even to Establishment Clause claims based upon effect or entanglement. Accordingly, *Crawford-El* provides no basis for reevaluation of the Tenth Circuit's decision.

CONCLUSION

For the foregoing reasons, Bauchman's petition for writ of certiorari should be DENIED.

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BRIEF OF UNITARIAN UNIVERSALIST ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONER RACHEL BAUCHMAN

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae,[1] the Unitarian Universalist Association, the American Humanist Association, Americans for Religious Liberty, the Council for Secular Humanism, the Freedom to Learn Network, the American Ethical Union, the American Association of University Women, and Americans for Democratic Action are religious institutions and civic and educational organizations dedicated to preserving the strict separation of church and state. Each *amicus* strongly endorses the idea that the separation of church and state is particularly important in our public schools, which should be preserved as neutral havens for secular education. *Amici* are submitting this brief because the Tenth Circuit decision will leave public schools susceptible to the risk of sectarian strife, subject students to religious proselytization in the classroom and substantially erode the wall of separation between church and state. Each *amicus* has filed a separate statement of interest attached in the appendix to this brief. Letters of consent for the submission of this brief are filed herewith.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No one other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Rachel Bauchman's petition for a writ of a certiorari involves a constitutional question which has serious ramifications for the preservation of the fundamental principle of separation of church and state. In affirming the dismissal of Bauchman's Complaint by the district court, the Tenth Circuit adopted standards of proof and pleading for Establishment Clause claims which conflict with the decisions of this Court and which impose unprecedented burdens on Establishment Clause claimants.

This narrowing of Establishment Clause jurisprudence is particularly important in the context of the public schools, where there are heightened concerns about the effect of religious advocacy on impressionable school children. The new standards adopted by the Tenth Circuit deprive public school students of a fair opportunity to prove that a school policy or practice is motivated by a purpose to advance religion since the standards exclude from the court's review all historical and circumstantial evidence of intent. Such pleading standards are well beyond the notice pleading requirements of the Federal Rules of Civil Procedure.

Consequently, public school students in the Tenth Circuit seeking to challenge religious proselytizing in the schools will be subject to special burdens in bringing their case to trial. Short of an express and contemporaneous admission of culpability by a school official, they will not be able to do so. *Amici* believe that, allowed to stand, the decision leaves public school classrooms subject to

the sectarian control of teachers and poses a threat to the proper adjudication of Establishment Clause cases.

STATEMENT OF THE CASE

At the time that this action was commenced, petitioner Rachel Bauchman ("Bauchman") was a public high school student at the West High School in Salt Lake City, Utah and a member of the West High School Choir ("Choir"). In her original and Amended Complaints, Bauchman alleged that the choir director, Mr. Torgerson ("Torgerson"), with the knowledge and consent of West High School officials, routinely used the West High School Choir as an instrument to promote his own religious views, proselytized students during class time, and coerced choir members into participating in religious activities as a part of their mandatory choir class requirements in violation of the Establishment Clause of the First Amendment.

Bauchman's Amended Complaint, and the evidence presented from the strictly circumscribed discovery allowed by the district court, document a nearly two-decade long history of Torgerson's classroom advocacy of his religious beliefs. As early as 1977, Torgerson, then the director of the South High School Choir in Salt Lake City, began his practice of arranging for the public school choir to perform at worship services for the Church of Jesus Christ of Latter Day Saints ("LDS") and at LDS religious buildings as a part of the students' mandatory class

requirements. Amended Complaint ("AC") ¶ 16(b); TCA 158.[2]

Torgerson continued to arrange performances at LDS services on a regular basis as instructor of the West High School Choir. AC ¶ 16(e); TCA 159. During the performances, the choir sang Christian religious songs, including LDS hymns. AC ¶ 16(f); TCA 159. Prayers and sacraments were offered at the services, and on at least one occasion, sacrament was passed among the LDS Choir members and over the non-members. AC ¶¶ 16(b), (f), (j); TCA 158-60. During these services, some of the LDS Choir members stood and "bore their testimonies" about the role of Jesus Christ in their life and their belief that the LDS Church is the only true church. AC ¶ 16(f); TCA 159.

In addition to regular choir performances, Torgerson scheduled several out-of-state tours where the choir performed its repertoire of predominantly Christian music at predominantly Christian religious venues. AC ¶¶ 16(f), (l); TCA 159, 161. The year before Bauchman joined the choir, Torgerson conducted a spring concert tour in the Pacific Northwest – the religious purpose of which was unmistakable. To mark the opening of the tour, Torgerson recited a prayer praising Jesus and invoking the assistance of "our heavenly father." AC ¶ 16(k); TCA 160-61. The choir performed primarily at LDS religious sites, with only two of the performances being at non-LDS sites. AC ¶ 16(l); TCA 161. One of the performances was

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[2] Citations to "TCA" refer to the Appendix to Bauchman's appeal No. 96-4101 to the United States Court of Appeals for the Tenth Circuit.

conducted at an LDS "fireside" service where Torgerson presented the choir as an LDS religious choir and where the LDS Choir members "bore their testimonies." AC ¶ 16(m); TCA 161-62. Upon returning from the tour, more than twenty students signed a petition in protest of the religious nature of the tour. AC ¶ 16(n); TCA 162.

Torgerson also made use of regular choir class time to instruct his students in his religious beliefs. AC ¶¶ 16(b), (g), (h), (i), (l); TCA 158-161. Torgerson improperly brought religion into the classroom by commemorating class events with prayer and by instructing the class during rehearsals to understand and believe the religious meaning of the lyrics. AC ¶ 16(k); TCA 160-61, 250, 329, 346, 352. On one occasion while the choir was rehearsing "Lamb of God," Torgerson shut off the lights in the classroom and instructed the students to visualize "Jesus dying for our sins." AC ¶ 16(i); TCA 160.

Torgerson continued these practices during the 1994-95 school year when Bauchman joined the choir. While Bauchman was a member of the choir, Torgerson exhorted students during a class rehearsal to accept the message of the Christian lyrics. TCA 219C, 770-71. On another occasion, following a class performance at a Baptist church, Torgerson offered a prayer of thanks to the "heavenly father." TCA 331, 338. Throughout the year, the choir continued to perform predominantly Christian music predominantly at Christian religious sites, particularly Mormon churches. TCA 219B, 219E, 334-35, 342-43, 672-74.

When Rachel complained of these practices and requested that Torgerson diversify the musical repertoire,

Torgerson retaliated by ostracizing Rachel from her classmates and embarrassing and harassing her during class. Torgerson repeatedly used his class lectures to berate Rachel for her opposition to his practices, emphasizing that as a Jew she should understand how Mormons are persecuted for their religious beliefs. AC ¶¶ 17(i), (j), (k); TCA 167-68. Rather than modify the repertoire and performance locations for the scheduled spring tour to deemphasize its religious focus, Torgerson himself cancelled the official tour and then surreptitiously organized a tour of religious venues which excluded the non-Christian members of the choir. AC ¶¶ 19(f), 17(g); TCA 166, 173.

In a further attempt to arouse sentiment against Rachel, Torgerson gave a letter from Rachel's father complaining of his practices to another choir member's parent to enlist the parents and their children's support in isolating Bauchman. AC ¶ 17(d); TCA 166. As a result of this conduct, Bauchman was ostracized from her classmates and subjected to epithets such as "Jew Bitch" and "Dirty Jew." AC ¶¶ 37, 49; TCA 21, 187, 191, 219F. She was told by her classmates to "go back to Israel," and a Nazi swastika was drawn on one of her posters for class office. *Id.* Fearing continued retribution for her religious views, Rachel decided not to join the choir in the 1995-96 academic year. AC ¶ 37; TCA 187-88.

Throughout his tenure, Torgerson made no effort to keep secret the religious purpose for his method of conducting the choir class. During the 1994-95 school year, Torgerson explained that "I bring religion into the classroom, and I ask my students to do the same." TCA 774. On several previous occasions in response to students'

complaints about his conduct in the choir class, Torgerson told students that he disagreed with Supreme Court law forbidding the advocacy of religion in the classroom and that he intended to continue to do so even though it was illegal. AC ¶¶ 16(h), (n); TCA 160, 162. Torgerson also once explained that he preferred having Mormon students in the choir because it made it easier to perform at LDS services. AC ¶ 16(d); TCA 158-59, 222.

ARGUMENT

I. The Standard of Proof Adopted by the Tenth Circuit Conflicts with the Analysis of Actual Purpose Applied by this Court.

A. Circumstantial and Historical Evidence Are Relevant to an Inquiry into the Government's Purpose Under the Court's Establishment Clause Cases.

This Court's jurisprudence makes clear that "the content of a public school's curriculum may not be based on a *desire* to promote religious beliefs." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590 n.40 (1989) (emphasis added). Although the Court generally gives great weight to the government's stated purpose, Establishment Clause jurisprudence requires courts to look behind the stated purpose to determine the government's actual purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) ("[I]t is required that the statement of such purpose be sincere and not a sham."); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (Act is unconstitutional when, despite an avowed secular purpose, the "pre-eminent purpose . . . is plainly religious in nature.")

In determining the government's purpose, this Court has never limited its examination to the explicit statements of purpose by legislators or other government actors, as the Tenth Circuit decision now requires courts to do.

Circumstantial and historical evidence have long been essential to the Court's evaluation of the government's actual purpose. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court invalidated an Arkansas statute prohibiting the teaching of creationism in the public schools based on its religious purpose, even though the statute did not explicitly state such a purpose. In evaluating the legislature's actual purpose, the Court looked beyond the contemporaneous statements of legislators to a similar "antecedent" statute which "candidly stated its purpose." *Id.* at 107-108. The Court also relied on circumstantial evidence indicating that "the statute was a product of the upsurge of 'fundamentalist' religious fervor." *Id.* at 98, 106-107.

This Court invalidated another creationism statute without an express statement of its religious purpose in *Edwards v. Aguillard*, 482 U.S. 578 (1987). In *Edwards*, the Court rejected as a "sham" the legislature's stated purpose of furthering "academic freedom" and "fairness" based on circumstantial evidence that its stated purposes could have been achieved more directly without advancing or promoting a particular religious belief. *See id.* at 586-589. Historical evidence of the legislature's intent was also relevant to the inquiry, as the Court determined the purpose of the current statute based on the legislature's purpose in drafting a previous "model" statute. *Id.* at 601 (Powell, J., concurring).

Once again, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court invalidated a statute calling for a moment of silence or prayer because of the statute's religious purpose. In discerning the statute's purpose, the Court did not limit its inquiry to statements by legislators, but rather considered the statute in light of its historical context, by gleaning its purpose from the history of three similar statutes passed at different times. *Id.* at 58, 65.

Indeed, this Court's endorsement analysis emphasizes the importance of context in evaluating whether the government's purpose is to endorse religion.[3] *Lynch v. Donnelly*, 465 U.S. 668, 694 (1983) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement of religion.") (O'Connor, J., concurring). "The endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice." *County of Allegheny*, 492 U.S. at 629. Although the Tenth Circuit acknowledged that the endorsement test calls for a consideration of historical context, it refused to consider Torgerson's twenty-year history of classroom advocacy of religion, holding that the endorsement test inquiry into

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[3] Under the endorsement test, the context of a challenged practice is relevant both to the question of effect and intent. As explained by Justice O'Connor: "The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning intent: *they can discern the intent by*, for example, *examining the context* of the statement." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (emphasis added).

context does not include "every alleged past constitutional violation." 132 F.3d 542, 560 (1997).

The Tenth Circuit's holding that a claimant can prove intent only through an express, contemporaneous statement of religious purpose finds no support in Establishment Clause jurisprudence and, indeed, is in direct conflict with this Court's decisions. Exclusion of all historical, circumstantial and contextual evidence of intent is contrary to the constitutional command that the court determine the actual purpose of a challenged act. More importantly, the Tenth Circuit standard poses nearly insurmountable obstacles to claims by public school students that a teacher is advocating religion in the classroom. The dismissal of Bauchman's complaints, which so clearly present evidence of Torgerson's religious purpose, dramatically illustrates how even the most egregious and long-standing abuses of a teacher's power will go unchecked and, indeed, unreviewed under the Tenth Circuit standard.

B. The Tenth Circuit Improperly Excluded Evidence of Torgerson's Subjective Intent.

In excluding all evidence of Torgerson's intent, the Tenth Circuit incorrectly held that the " 'actual' purpose component of the endorsement analysis . . . is an objective one, removed from any subjective intent Mr. Torgerson may have." 132 F.3d 542, 560 (1997). To the contrary, the endorsement test, expanding upon the purpose and effect prongs of the *Lemon* test, is intended to identify those practices which by virtue of the *subjective intent* of

the government or the *objective effect* of the practice convey a message of government support or disapproval of religion. As explained in *Lynch v. Donnelly*, 465 U.S. 668 (1983):

> The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community . . . Examination of both the *subjective* and objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Id. at 690 (O'Connor, J., concurring).

The subjective intent of a public school teacher's curriculum decisions is especially relevant in determining whether the teacher has communicated a message of endorsement to students. As recognized by this Court's Establishment Clause cases, public school teachers can affect the thoughts and behavior of impressionable school children. *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (When "religious exercises are directed at impressionable children who are required to attend school, . . . government endorsement is much more likely to result in coerced religious beliefs.") (O'Connor, J., concurring). By virtue of their authority and the tendency of students to emulate them, teachers have a unique power to endorse religion in the classroom. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). If courts are to determine whether a public school teacher's conduct or teaching communicates an intention to promote religion, they must consider all evidence of the teacher's subjective intent.

By excluding this probative evidence, the Tenth Circuit standard simply ignores the fact that students at West High School, like Bauchman, were aware of the history of Torgerson's conduct and statements. TCA 21, 219F, 227, 237, 250. A student with knowledge of Torgerson's course of conduct would reasonably perceive that he intended to advocate a belief in Christianity or in religion in general. It is this perspective, that of the student, which the court must examine in understanding whether Torgerson's conduct communicated an intent to promote religion. The court's suggestion that a reasonable observer would not view the conduct as motivated by a religious purpose because of the "historical tension between the government and the Mormon Church" not only discounts the students' unique perspective, but also turns the analysis on its head by suggesting that proselytization in the public schools is legitimate as long as it has been tolerated historically. 132 F.3d at 555.

As illustrated by *Lee v. Weisman*, 505 U.S. 577 (1992), the court must consider the special context of the public schools to understand how students might perceive intent differently than adults. *Id.* at 592 (Religious "exercises in public schools carry a particular risk of indirect coercion."); *see also, Edwards*, 482 U.S. at 585 (court must apply the *Lemon* test, "mindful of the particular concerns that arise in the context of public elementary and secondary schools."). *Lee* recognizes that in the context of the public schools, the dissenter of school age may more readily perceive that the public school intends to promote or endorse religion. *See Lee*, 505 U.S. at 592-94. As stated in *Lee*:

> what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Id. at 592-93.

By excluding all evidence of a school official's subjective intent and ignoring the unique perspective of high school students, the Tenth Circuit's endorsement analysis leaves students without adequate protection from the advocacy of religious beliefs in public classrooms.

II. The Pleading Standard Adopted by the Tenth Circuit Deprives Public School Students Challenging Religious Practices in the Schools of the Ordinary Inferences Made on a Motion to Dismiss.

Liberal federal pleading standards require that on a motion to dismiss the court must construe the allegations in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A court ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) must therefore assume the truth of the facts as alleged and draw any reasonable inferences consistent with the allegations. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *see Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) (motion should be granted only if relief cannot be granted under any set of facts consistent with allegations). Furthermore, when pleading intent, a plaintiff need only plead it generally. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.")

The Tenth Circuit declined to apply these well-established rules of pleading in evaluating Bauchman's Amended Complaint and instead improperly weighed the evidence, made inferences and assumptions favorable to defendants, and altogether disregarded evidence presented by Bauchman. Although the court explicitly stated that "the amended complaint contains numerous allegations to support Ms. Bauchman's claim that Mr. Torgerson has unconstitutionally promoted his religious beliefs in the classroom for over twenty years," the court concluded that Bauchman had not pled Torgerson's "religious purpose." 132 F.3d 542, 559 (1997). Rather than draw reasonable inferences of religious purpose suggested by Torgerson's own statements, his harassment and exclusion of Bauchman, and his routine performance of Christian music at Mormon churches, the court drew inferences favorable to the *defendants*, explaining that the court could "discern a number of plausible secular purposes for the defendants' conduct." *Id.* at 554.

By depriving Establishment Clause claimants of the ordinary inferences made on a motion to dismiss, the Tenth Circuit decision effectively requires a plaintiff pleading religious intent to *disprove* secular intent in the *pleadings*. According to this new standard, Establishment Clause plaintiffs must allege that there is "no 'clearly secular purpose' "[4] for the challenged practice and must

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[4] The Tenth Circuit incorrectly held that under the *Lemon* test, a government practice is constitutional as long as there is some secular purpose. To the contrary, the "purpose prong of the *Lemon* test . . . is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. 668, 690-691 (1984); *see*

also allege facts sufficient to disprove any hypothetical secular purpose. *Id.* at 554, 555. The court found Bauchman's pleading of purpose insufficient to support her Establishment Clause claim because she failed to allege facts showing that (1) Torgerson's repertoire was markedly different from other school choirs, or (2) that the acoustics or seating at the church venues were unsuitable for performance. *Id.* at 555. This standard imposes unprecedented burdens on Establishment Clause plaintiffs by requiring them to anticipate in their pleadings every possible secular purpose imagined by the court.

Although the Tenth Circuit concluded that "the amended complaint clearly asserts defendants' conduct was motivated by a religious purpose," the court adopted the district court's decision which rejected Bauchman's Amended Complaint on the basis that her allegations were "unsupported or at odds with an objective view of evidence developed in discovery." 1996 WL 407856, at *3. The district court decision adopted by the Tenth Circuit improperly engaged in a weighing of the evidence, at times, simply ignoring or dismissing the evidence altogether. Of particular importance is the district court's holding that Bauchman's allegations concerning Torgerson's organization of a covert spring tour and concerning her allegations of his criticism of her during class were "unsupported by [the] evidence produced." *Id.* at *6-*7. Perhaps most importantly, the district court refused to draw any inference of Torgerson's religious purpose from

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also Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments in school unconstitutional due to its religious purpose, even though the state had some secular objectives).

his admission that he brought religion into the classroom and expected his students to do the same. *Id.* at *4.

In addition to denying Establishment Clause claimants the benefit of favorable inferences at the pleading stage, the Tenth Circuit decision imposes an unprecedented pleading requirement for pleading intent which is inconsistent with the longstanding federal rule, and indeed, with Tenth Circuit precedent, allowing intent to be pled generally. *See Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269-1270 (10th Cir. 1989) (to plead racial animus for purposes of an equal protection claim, it is sufficient to make general averments of intent unaccompanied by supporting factual allegations). Under the Tenth Circuit's highly particularized pleading standard, an Establishment Clause plaintiff must plead an explicit, contemporaneous and specific statement of the government actor's religious purpose – a generalized pleading supported by circumstantial evidence is insufficient.

The heightened pleading standards adopted by the Tenth Circuit impose a unique hardship on Establishment Clause claimants. Without an admission of culpability by a government official and allegations which exclude all possible secular purposes, an Establishment Clause claim based on the religious purpose of a government practice will not survive a motion to dismiss. This harsh pleading standard is especially unjust in the context of challenges brought by public school students – a particularly important area of Establishment Clause law. As Bauchman's Amended Complaint illustrates, the Tenth Circuit's restrictive pleading standard deprives claimants who clearly state violations of the Establishment Clause of a fair opportunity to prove their case.

III. The Policy Rationales Presented by the Tenth Circuit to Justify the Heightened Standards of Pleading and Proof Are Contrary to the Constitutional Principle of Strict Enforcement of the Establishment Clause in the Public Schools.

As this Court has noted, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Thus, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). This heightened scrutiny is necessary because the system of public education presents a unique opportunity for the state to infringe students' freedom of conscience. "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at 584. Public schools must, therefore, "maintain a strict and lofty neutrality as to religion." *School District of Abington Township v. Schempp*, 374 U.S. 203, 218 (1963).

The unprecedented pleading and proof standards imposed by the Tenth Circuit turn these constitutional principles on their head, substituting heightened protection of school children for heightened protection of the decisions of school teachers, administrators and school boards. In justifying these heightened standards, the Tenth Circuit states that they are necessary to avoid involving courts in education decisions best left to the states and local school boards. 132 F.3d 542, 561 (1997).

Such a holding is contrary to the very essence of Establishment Clause jurisprudence.

This Court has never exempted public school curriculum decisions or practices from review since these decisions go to the very heart of Establishment Clause concerns in the context of the public schools. This Court's decisions in *Epperson*, *Edwards*, and *Lee* reflect that religious practices and curriculum decisions in the schools are not immune from review, even if they are long-standing practices traditionally left to the authority of school officials. *See Lee*, 505 U.S. 577 (invalidating graduation benediction); *Edwards*, 482 U.S. 578 (invalidating statute requiring simultaneous teaching of evolution and creationism); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating statute requiring teaching of creationism). That the curriculum decisions in this case were made by a teacher rather than a state legislature or school board in no way minimizes the need for court review of practices which bring religion into the classroom in an impermissible manner. To exclude the classroom conduct of public school teachers from review would be to leave public school students without protection against the decisions which most directly affect their education and over which there is the least public review.

In further support of the heightened pleading and proof standards, the Tenth Circuit states that to hold otherwise would be to subject religious public school teachers to a "unique disability" simply by virtue of their religious beliefs and would make school districts less amenable to hiring openly religious teachers. 132 F.3d at 560-561. Although the case law does support the notion that teachers have free speech and free exercise rights as

employees of the public schools, "even the most cursory reading of the Court's school prayer cases belies any notion that these may trump schoolchildren's Establishment Clause rights." *Doe v. Duncanville Independent School District*, 994 F.2d 160, 166 (5th Cir. 1993).

In any case, allowing challenges like the one presented in Bauchman's Amended Complaint does not threaten to subject public school teachers to a special disability due merely to their religious beliefs. Bauchman's Amended Complaint alleges much more than the mere fact that Torgerson was a religious man or that he selected religious music. The gravamen of her complaint is that Torgerson brought his religion into the classroom in an attempt to advance his beliefs.

The heightened pleading and proof standards adopted by the Tenth Circuit violate the principles of strict enforcement of the Establishment Clause in the public schools by protecting public school teachers at the expense of public school students, thus imposing a *unique disability on public school students* seeking to prove that a public school official has violated the Establishment Clause. *Amici* are concerned that these standards threaten to break down the wall between church and state in the public schools and to undermine our public schools as neutral havens for secular education. As this Court has emphasized, the importance of keeping our nation's public schools free of sectarian strife cannot be understated "if we are not to strangle the free mind at its source and teach youth to discount important principles of our

government as mere platitudes." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

CONCLUSION

Because the decision below conflicts with the Establishment Clause decisions of this Court and with the constitutional principle of careful scrutiny of public school decisions involving religion and because it imposes unwarranted burdens at the pleading stage for Establishment Clause claimants, Bauchman's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF INDIVIDUAL *AMICUS*

Unitarian Universalist Association

The Unitarian Universalist Association is a religious association of more than one thousand congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. The Association's resolutions include, specifically, statements in opposition to religious practices, observances and indoctrinations in public schools.

Americans for Religious Liberty

The Americans for Religious Liberty, founded in 1981, is a nationwide nonprofit public interest educational organization dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL has participated as an *amicus* in other cases before this Court that have implicated these concerns.

American Humanist Association

The American Humanist Association, founded in 1941, is an educational, philosophical, and religious organization with members and local affiliates throughout the

United States. The Association has adopted formal statements in support of the principle of church-state separation and the religious neutrality of our common public schools. The Association has participated as an *amicus curiae* in a number of cases before this and other courts.

Council for Secular Humanism

The Council for Secular Humanism is dedicated to furthering the ideals of freedom of conscience, as espoused by Thomas Jefferson, James Madison, and other founding fathers of the United States. We are committed to the First Amendment of the Constitution and the principle of separation of church and state. We represent millions of Americans, who are nonbelievers – agnostics, atheists, and secular humanists. In our view, all citizens of this great country should be afforded the same liberty of conscience – to believe or *not believe* in any orthodox religious tenet or doctrine. The public schools should provide the same protections for all citizens, including Rachel Bauchman. If her rights can be abrogated in the public schools, then who is safe? Hence, we wish to join in this *amicus* brief on her behalf.

Freedom to Learn Network

The Freedom to Learn Network, an all-volunteer grassroots organization that began in 1992 in response to challenges to public education, believes that *all* children have the basic right to educational freedom. The common goal of our diverse membership is to support and maintain public education while striving to improve its quality. As stated in our *Declaration of Principles*, "we believe

in the separation of church and state, and in its obvious corollary, separation of church and public school. Public officials should not seek to promote one set of religious beliefs over others. Religious doctrine should be appropriately taught at home, in church, and in other private religious settings."

American Ethical Union

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist Societies. Ethical Culture began in 1876 with the founding of the New York Society for Ethical Culture. Today there are twenty-two societies in the United States. Ethical Culture is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has from time to time together with other religious organizations signed on to *Amicus Curiae* Briefs in support of Separation of Church and State. From the time of its inception, Ethical Culture has consistently supported the Constitutional separation of Church and State.

American Association of University Women

For well over a century, the American Association of University Women (AAUW), an organization of 160,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,600 communities across the country, AAUW members work to promote education and equity for all women and girls. Current legislative priorities include gender equity in education, reproductive choice, and

workplace and civil rights issues. AAUW affirms the doctrine of separation of church and state.

Americans for Democratic Action

Americans for Democratic Action, Inc. ("ADA") is an independent liberal political organization, founded in 1947, dedicated to promoting individual liberty and economic justice. ADA publishes a weekly legislative newsletter for liberal activists, a quarterly newsletter, special reports, including an annual voting record report that ranks Members of Congress according to a liberal quotient, based on a full spectrum of domestic and international policy issues. In addition to its legislative advocacy, ADA maintains a political action committee to support liberal candidates for Congress. ADA also engages in independent campaign activity in support of presidential candidates.

No. 97-1764

(10)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

—v.—

WEST HIGH SCHOOL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO HER PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

v.

WEST HIGH SCHOOL, *et al.*,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO HER PETITION FOR WRIT OF CERTIORARI

Repeatedly in their briefs in opposition, respondents' arguments rest on a mischaracterization of the Amended Complaint as seeking to state a claim that religious singing, without more, is unconstitutional. Respondents also strain to characterize the decision below as far less sweeping than it in fact is. We address these misconceptions first, then turn to respondents' more substantive arguments.[1]

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[1] For purposes of brevity, this brief uses the abbreviations and defined terms established in the Petition.

I.

Respondents Mischaracterize the Amended Complaint and the Decision Below

The briefs in opposition put forward three central misconceptions:

First, this is not a case about whether all religious songs should be banned, Torg. Br. 1; Intervenors' Br. 11;[2] that argument is a strawman. Petitioner alleged — and, we submit, proved — specific statements and conduct by Torgerson during Rachel's year in the class evincing a purpose to promote religion that went beyond the selection of Christian tunes and use of Mormon and other Christian venues. As set forth in the Petition, in addition to scheduling predominantly Christian music, TCA 334-35, 342-43; *see also* TCA 409-11, 672-74, Torgerson instructed the class that a true appreciation of music comes through religious experience, TCA 770-71; offered a prayer to the "heavenly father" at a performance, TCA 331, 338; criticized Rachel for expressing concerns about his endorsement of religion, including expressly comparing Mormons like Torgerson with Jews like Rachel, A.C. ¶ 17(k); TCA 167-68, 772; and, after formally canceling the annual class tour, sought to organize a secret replacement tour limited to Christian students, A.C. ¶ 17(g)-(h); TCA 166-67; 329-31; 353-54; 785-86. In addition, during the limited discovery it emerged that the School District had reprimanded Torgerson — albeit secretly and ineffectually — for attempting to arrange for the class,

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[2] "Torg. Br." refers to Respondent Richard Torgerson's Brief in Opposition to the Petition, and "Intervenors' Br." refers to Respondent Intervenors' Brief in Opposition to the Petition.

during Rachel's year, to perform as part of religious ceremonies at a church. TCA 586; *see also* TCA 811.[3]

Respondents' answer to these allegations is, like the courts' below, simply to select evidence that they contend negates the allegations, ignore other evidence, and conclude that the allegations therefore are groundless. But that selecting and weighing of evidence is precisely what a court is not supposed to do at the pleading stage.

Second, the Tenth Circuit's opinion did not merely require specificity in pleading religious purpose, or something more than "conclusory allegations of an improper purpose," as Intervenors would have it. Intervenors' Br. 10. As indicated above, the Amended Complaint offered plenty of specificity. That did not satisfy the Tenth Circuit, because the standard it erected requires "conduct or statements that *expressly*," *Bauchman* v. *West High School,* 132 F.3d 542, 561 (10th Cir. 1997) (A40), and contemporaneously, *id.* at 560 (A39), manifest an intent to promote religion.

Third, the fact that the motion below was one to file an amended complaint rather than a motion to dismiss after the complaint was filed makes no difference. The courts below denied the motion because the filing would supposedly have been futile, in that they thought the Amended Complaint would not have survived a motion to dismiss. *See Bauchman*, 132 F.3d at 561-62 (A41-42). The fact that the denial of the motion

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[3] During Rachel's year in his class, Torgerson also admitted that he "bring[s] religion into the classroom, and . . . ask[s his] students to do the same." TCA 774. Intervenors claim to see a significant difference between that version of the statement, which appeared in an interrogatory response, and Mrs. Bauchman's recollection during deposition, "I don't believe in leaving my religion at home and ask my students not to do the same." Intervenors' Br. 6 n.5. It stretches the imagination to think that a jury would perceive a material distinction between these two versions of the statement.

is reviewable only for abuse of discretion, School Dist. Br. 6,[4] is irrelevant, because it is an abuse of discretion to apply the wrong legal standard, *Linder* v. *Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998); *Genesee Brewing Co.* v. *Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir. 1997), which is what occurred here. In short, this case remains at the pleading stage, and the ruling below is correspondingly broad in its terms and effect.

II.

Crawford-El Governs the Issue of the Standard of Proof of Intent in Constitutional Torts and Calls for Reversal

Respondents argue that the fact that *Crawford-El* v. *Britton*, ___ U.S. ___, 118 S. Ct. 1584 (1998), addressed a restriction on proof of intent that was phrased in terms of a burden of proof — clear and convincing evidence — somehow makes that case inapplicable to the restriction on proof of intent here. Torg. Br. 16; School Dist. Br. 15. That reasoning is nonsensical. If anything, *Crawford-El* applies with greater force to this case, because the restriction is so much more sweeping. The District of Columbia Circuit had created a relatively narrow, albeit unconstitutional, increase in the plaintiff's burden at trial; whereas the Tenth Circuit would exclude certain claims altogether based on a broad proscription of whole categories of evidence. In fact, as noted in Rachel's Supplemental Brief at 3, the Tenth Circuit test barring circumstantial and historical evidence of intent is precisely the test that the D.C. Circuit had earlier adopted and then rejected as overbroad. 118 S. Ct. at 1589 n.5; *Crawford-El* v. *Britton*, 93 F.3d 813, 815, 817-18 (D.C. Cir. 1996), *vacated and remanded*, 118 S. Ct. 1584 (1998). Thus, to an even greater extent than in *Crawford-El*, the

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[4] "School Dist. Br." refers to the School District Respondents' *Brief in* Opposition to the Petition.

Tenth Circuit has "alter[ed] the cause of action itself in a way that undermines the very purpose of § 1983 — to provide a remedy for the violation of federal rights." *Crawford-El*, 118 S. Ct. at 1595.

Further, it is not true that the Tenth Circuit was motivated by different policy concerns from those that motivated the D.C. Circuit, as the School District respondents claim. *See* School Dist. Br. 14-15. Both courts relied on the perceived need to protect government officials from the intrusions of civil discovery. *See Bauchman*, 132 F.3d at 560-61 (A39-40); *Crawford-El*, 118 S. Ct. at 1590. This Court in *Crawford-El* rejected that policy concern as a basis for altering the quantum of evidence a plaintiff must amass to prove intent, relying instead on case management techniques to address that concern. *Id.* at 1596-98. That rule applies with full force to the Tenth Circuit's new standard of proof in this case.

III.

The Decision Below Creates a Split With the Third, Fifth, Eighth and Eleventh Circuits, Which Accept Indirect Evidence to Prove Religious Purpose

The Intervenors attempt to argue away the split in the Circuits based primarily on the misreading of the decision below to be merely a requirement of specificity rather than a requirement of express and contemporaneous communication of an intent to promote religion. Intervenors' Br. 9-11. Torgerson's version is based on a mischaracterization of the Amended Complaint as being about religious singing only, rather than a far broader complaint about the teaching practices of a long-tolerated rogue teacher. Torg. Br. 17-18. These points have been addressed above.

Beyond that, respondents' arguments strengthen the point that the Tenth Circuit has split from its sister Circuits on the use of indirect evidence to prove religious purpose. Respondents

argue that the Third, Fifth, Eighth and Eleventh Circuits' decisions relying on indirect evidence to prove intent are inapposite because each considered policy or legislation, rather than an individual's actions. School Dist. Br. 11; Torg. Br. 18. But the other Circuits' use of indirect evidence to prove legislative intent — which is truly controversial, *see* Petition 13-14 — makes all the more extreme the Tenth Circuit's refusal to consider such evidence in the context of an individual actor, where that use is routine.

Torgerson's argument that the other Circuits relied on "objectively discernible" evidence of intent, rather than the kind of evidence Rachel relies on, Torg. Br. 18, is essentially wordplay. The historical evidence relied on by the Third and Eleventh Circuits, or the evidence of public reaction relied on by the Fifth Circuit, is no more "objectively discernible" than the evidence of classroom speeches and school reprimands relied on by petitioner. *See ACLU* v. *Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1484 (3d Cir. 1996); *Jager* v. *Douglas County Sch. Dist.*, 862 F.2d 824, 829-830 (11th Cir. 1989); *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996).

IV.

There Are No Alternative Holdings Below that Preclude a Grant of Certiorari

Respondents contend that the district court's holdings on qualified immunity preclude review here. School Dist. Br. at 6; Torg. Br. 21-22; Intervenors' Br. 6-8. This contention was, however, never reached by the court below. The defense is in any event founded on respondents' erroneously narrow view of the Amended Complaint as being based on the singing of religious songs alone. Fairly viewed, the Amended Complaint pleads conduct that violated what any reasonable observer would know to be clearly established law. In fact, as evidenced

by the reprimands Torgerson received immediately before, and during, Rachel's school year, TCA 586, 811, it is evident that both Torgerson and the School District respondents knew his conduct to be contrary to the well-established command of the Establishment Clause.

The School District respondents (but not the others) contend that the Tenth Circuit would have barred the claim even absent its erroneous standard of proof of intent because the court found that the Amended Complaint pled only the existence of a religious purpose, not the absence of a secular purpose. School Dist. Br. 7. This error is properly before the Court and does not preclude certiorari, because it is encompassed within the second question presented: it is based on the lower courts' highly restrictive reading of the Amended Complaint to allege a claim based on choral singing of religious songs with nothing more. 132 F.3d at 553, 560 (A23, 38). Fairly read, the Amended Complaint alleges actions by Torgerson — such as planning a class tour that would exclude non-Christians or teaching that a true appreciation of the class repertoire could only be achieved by religious experience — that could only be motivated by a religious purpose.

Moreover, the Tenth Circuit's standard is wrong as a matter of law. This Court's decisions do not permit any purportedly secular reason, however incidental, to immunize fiercely religious purposes behind government conduct.[5] Rachel's substantiated allegations demonstrate that despite an "avowed" secular purpose, Torgerson's "pre-eminent purpose . . . [was] plainly religious in nature." *Stone*, 449 U.S. at 41. As Justice

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[5] If this were the case, then this Court, in *Stone* v. *Graham*, 449 U.S. 39, 41-42 (1980), would not have prevented Kentucky public schools from posting copies of the Ten Commandments in classrooms to instill the Commandments' secular values (*e.g.*, one should not kill) to students, as well as to illustrate their connection to the American legal system. *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

O'Connor recognized, the "purpose prong of the *Lemon* test . . . is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring).[6]

Finally, Torgerson's argument that this Court should reject an Establishment Clause claim based on religious purpose without effect or entanglement, Torgerson Br. 19, contradicts this Court's explicit holding that a religious purpose alone is sufficient to render government action unconstitutional. *Edwards* v. *Aguillard*, 482 U.S. 578, 585 (1987).[7]

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[6] Respondents themselves stumble in the attempt to resuscitate the Tenth Circuit's absolutist position. Respondents twice refer to the question of Torgerson's "primary motivation," School Dist. Br. 8, 9, thus conceding that the relevant issue is whether Torgerson was primarily motivated by his purpose of promoting religion. This question of motivation is a classic jury issue that is eminently susceptible to proof through indirect evidence.

[7] Rachel continues to assert her claims that respondents' conduct violated all three prongs of the Court's analysis in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

Conclusion

The Petition should be granted for plenary consideration, or granted and the decision below reversed and the case remanded for reconsideration in light of *Crawford-El*.

Respectfully submitted,

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